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No. 08- 081372

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS SPIELBAUER,

Petitioner,

v.

COUNTY OF SANTA CLARA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a public employee invokes his or her Fifth Amendment right against self incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from any criminal use of the employee's statements before it can dismiss the employee for refusing to answer questions in connection with the investigation?

PARTIES TO THE PROCEEDING

Thomas Spielbauer is the Petitioner. The County of Santa Clara, was the employer of Mr. Spielbauer, and the County Board of Supervisors appoints the Public Defender, respondent, Jose Villarreal.

The Personnel Board of the County of Santa Clara, considered and denied the administrative appeal brought by Mr. Spielbauer of the decision of Mr. Villerial.

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OPINIONS OF THE STATE COURTS BELOW

The decision of the California Supreme Court, official citation, *Spielbauer v. County of Santa Clara*, 45 Cal. 4th 704 (2009). Appendix A.

The decision of the California Court of Appeal, 6th Appellate District, official citation, *Spielbauer v. County of Santa Clara*, 146 C.A. 4th 914 (2008). Appendix B.

Appendix C is the trial court decision.

Appendix D is the administrative decision of the Santa Clara County Personnel Board.

STATEMENT OF JURISDICTION

By 28 U.S.C. § 1257(a), this Court has jurisdiction, as this petition is taken from the final decision, filed February 9, 2009, of the state court of last resort of California, the California Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which states that, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .", and the Fourteenth Amendment.

INTRODUCTION

Petitioner Thomas Spielbauer was fired for insubordination for refusing his public employer's demand that he testify in an administrative investigation over his proper Fifth Amendment objection. Mr. Spielbauer claims the firing was wrongful, and that he was not obligated to speak until an affirmative grant of use immunity was provided to him. The trial court disagreed, but was reversed by the state court of appeal, who was then reversed by the California Supreme Court, who observed,

> The United States Supreme Court has been less than clear about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for non-penal use (Appn. A, pg. 13a).

The question presented is the question as framed and considered by the California Supreme Court. The Court was reviewing the unanimous decision of the California Sixth Appellate District Court, which in a 51 page opinion, agreed with the Petitioner herein (reversing the trial court decision), that ". . . having invoked his constitutional right against self-incrimination, he could not be compelled, by threat of job discipline, to answer his employer's questions unless his constitutional privilege was first supplanted by an affirmative grant of criminal use immunity coextensive with the constitutional protection"(Appn. A, pg. 2a).

The California Supreme Court ruled consistent with the reasoning of the Federal Court of Appeal, Second Circuit, in the case of *Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation of N.Y.*, 426 F. 2d 619 (2nd Cir. 1970) (*Sanitation Men II*),[1] because compelled statements over a Fifth Amendment objection are excluded from evidence in a later criminal proceeding, then the rights of public employees, who should be held to a different standard, are sufficiently protected by that prospective exclusion, and no affirmative grant of immunity is required.

Thus the question is framed, as to public employees subjected to an administrative interrogation, are they relegated to protection by the exclusionary rule announced by this Court in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), or, like other persons, are they entitled to ". . . stand mute without fear of punishment for his refusal to answer . . ." (Appn. B, pg. 60a), until an ". . . affirmative grant of criminal use immunity coextensive with the constitutional protection. . ." is provided (Appn. A pg. 2a) (*see Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Chavez v. Martinez*, 538 U.S.760, 770,771 (2003])), i.e. exclusion and immunity, is there a difference for public employees?

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1. The Second Circuit decision is commonly referred to as "*Sanitation Men II*" as it was decided following the remand from the U.S. Supreme Court decision in *Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation of the City of New York*, 406 U.S. 691 (1972).

THE STATEMENT OF THE CASE

Thomas Spielbauer requests review by this Court arising from his termination from his employment as a Deputy Public Defender with the County of Santa Clara, California. He was terminated in material part for insubordination for refusing to give testimony over his Fifth Amendment objection at an administrative investigation interview. Mr. Spielbauer contends that he was entitled to ". . . stand mute without fear of punishment for his refusal to answer . . ."(Appn. A. pg. 60a, quoting *Lefkowitz v. Turley, supra,* at pg. 77) until an ". . . affirmative grant of criminal use immunity coextensive with the constitutional protection. . ." [*Chavez v. Martinez,* 538 U.S. 760, 770-771 (2003)], was provided. His public agency employer disagreed, contending that he was sufficiently protected by the exclusionary rule applicable to administratively compelled statements as held by this Court in, *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967).[2] His employer contended that once he was apprised of that exclusionary rule, he could not stand mute, nor demand an affirmative grant of criminal use immunity.[3] Instead

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2. See also the California cases, *Kelly v. State Personnel Bd.*, 94 C.A. 3d 905 (1979) ; *Lybarger v. City of Los Angeles,* 40 C. 3d 822 (1985); *Szmarciarz v. State personnel Board,* 79 C.A. 3d 904 (1978).

3. The supervisor attempted to give an informed choice to Mr. Spielbauer by assuring him that his statements could not be used against him in criminal proceedings. However, such assurance is not entirely truthful. He did not inform Mr. Spielbauer that he would have to enforce the exclusion. It

(Cont'd)

he could be, and was, terminated for insubordination for refusing to answer questions relevant to his employment.

The case was appealed by way of administrative mandamus, and the trial court, The Honorable James Kleinberg, upheld the termination (Appn. C). Upon appeal to the California 6th Appellate District Court, the ruling of the trial Court was reversed. In the decision of the panel delivered by the Honorable Conrad L. Rushing, the 6th District Court of Appeal, ruled that protections described in the cases of this Court under *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972), and *Lefkowitz v. Cunningham*, 431 U.S. 801 431 U.S. 801, 805 (1977), contemplated protection by an affirmative grant of use immunity, "i.e. an undertaking by the state not to use the answers to prosecute." (Appn. B, pg. 61a).

> By allowing a witness to insist on an immunity agreement *before* being compelled to give incriminating testimony in a noncriminal case, the privilege preserves the core Fifth Amendment right from invasion by the use of that compelled testimony in a subsequent criminal case [*Chavez v. Martinez*, 538 U.S. 760, 771 (2003)] (emphasis in original),

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(Cont'd)
would be upon Mr. Spielbauer to finance the motion, persuade the trial court, and identify any fruits of the statement. Mr. Spielbauer was not told that the prosecutor would be provided a copy of his statements without agreement by the prosecutor to give them immunity.

> . . . insistence on a prior grant of immunity is essential to memorialize the fact that the testimony had indeed been compelled and therefore protected from use against the speaker in any 'criminal case.'(*Chavez v. Martinez, supra,* 771-772).

The 6th District Court criticized other California authority conflating the exclusionary prophylactic remedy with the protection of an affirmative grant of use immunity. Citing to this Court's decisions in, *Stevens v. Marks,* 383 U.S. 234, 246 (1966); *Maness v. Meyers,* 419 U.S. 449, 461-462(1975); *Pillsbury Co. v. Conboy,* 459 U.S. 248, 261, 262 (1983); *United States v. Doe,* 465 U.S. 605, 609-610 (1984); *Chavez v. Martinez,* 538 U.S. 760, 768, 771 (2003); Justice Rushing pointed out that this high Court has ". . . refused to adopt 'a doctrine of constructive use immunity'"(Appn. B, pg. 65a, quoting from *United States v. Doe, supra,* at 616). In numerous settings this Court has plainly held that requiring the witness to protect himself by invoking the exclusionary rule in a later proceeding was insufficient "predictive judgment" (Appn. B pg 64a; *Pillsbury Co. v. Conboy supra,* 26, 262). In *United States v. Aloyzas Balsis,* 524 U.S. 666, 683 (1998) (footnote 8), This Court stated that,

> Of course, the judicial exclusion of compelled testimony functions as a fail-safe to ensure that compelled testimony is not admitted in a criminal proceeding. The general rule requires that a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would beobligated to protect

> against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination [*Pillsbury Company v. Conboy*, 459 U.S. 248, 261 (1983)]. The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity "would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee." [*Maness v. Meyers*, 419 U.S. 449, 462 (1975) (footnote and internal quotations marks omitted)] This general rule ensures that we do not "let the cat out with no assurance whatever of putting it back," (*id.*, at page 463) (internal quotation marks omitted), and leaves the decision whether to grant immunity to the Executive in accord with congressional policy, see *Pillsbury*, *supra*, at page 262.

Justice Rushing stated that, this Supreme Court has acknowledged that the two principles, immunity and exclusion, are in some respects "coextensive", "however, it has steadfastly refused to fuse them into a single rule." (Appn. B, pg. 63a, citing *Chavez v. Martinez*, *supra*, 538 U.S. At pp. 769-770). He reiterated that public employees like, "... policeman, ... teachers and lawyers, are not relegated to a watered down version of constitutional rights" (*Garrity v. New Jersey* [*supra*] at pg. 500).

The California Supreme Court took the opposite position in overturning the ruling of the California 6th District Court of Appeals. In reviewing the same decision discussed by Justice Rushing, the California Supreme Court in the opinion delivered by Justice Baxter stated,

> The United States Supreme Court has been less than clear about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for non-penal use (Appn. A, pg. 13a).

The California Court claimed that a different standard is applied to public employees based upon ". . . different considerations . . ."(Appn. A, pg. 20a), as distinguished from, for instance, lawyers [*see; Maness v. Meyers, supra*; *Spevack v. Klein*, 385 U.S. 511 (1967)]. Recognizing that the seminal cases of *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley, supra*; and *Lefkowitz v. Cunningham (supra)*; *Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968), all arose in a context where the employee, public officer or contractor was required to waive the existing immunity under state statues, the California Supreme Court followed the position of the Federal Second Circuit Court of Appeals decision in, *Uniformed Sanitation Mens Assn., Inc. v. Commissioner of Sanitation of New York*, 426 F. 2d 619, 626 (2d Cir. 1970) (*Sanitation Men II*); (Appn. A, pg. 24a).

In *Sanitation Men II*, the Second Circuit reasoned that there need be no statute conferring the criminal

use immunity required to discharge a public employee who refuses, on self-incrimination grounds, to answer job-related questions. The court ruled that the very act of telling the witness that he would be subject to removal if he refused to answer was to have conferred such immunity, and informing him of the exclusionary rule was sufficient to have him make an informed decision regarding his rights. The California Court reasoned that the U.S. Supreme Court has ruled that the "... Constitution affords a public employee no right to refuse to account for his or her job performance, or to avoid dismissal as punishment for such a refusal" (Appn. A, pg. 35a). The fact that the statements are compelled over the objection of the employee, invokes the exclusion under *Garrity*, and therefore is, unlike protection by an affirmative agreement of immunity afforded others, sufficient protection for public employees.

Petitioner herein contends that public employees should not be second class citizens, relegated to a watered down version of the Constitution. A promise of later exclusion that has to be successfully asserted in a later criminal proceeding is no substitute for an agreement of immunity with the prosecutor, identifying up front the statements immunized. Only upon such conferral of immunity is there sufficient assurance of protection to justify compulsion of the employee's statement over his or her Fifth Amendment objection. Further, the position taken by the California Supreme Court effectively eviscerates prosecutorial discretion, and replaces it with the decision of every low and mid level public servant who determines that he is entitled to interrogate a witness employee. The position of the

California Supreme Court makes obsolete the statutory system of immunity extent throughout the country.[4] If a constitutional privilege sufficient to protect the witness through later exclusion is invoked by a compelled statement combined with an informed choice as to not suffer the consequences of silence, then it cannot be logically said that any compelled statement is not automatically immune, safe from use in later criminal prosecution, irrespective of the witness' position as a public servant. To conflate immunity with exclusion is to give license to the unlawful compulsion of statements, and the violation of civil constitutional rights.

As Justice Rushing commented, the position creates a paradox of legality.

> The exclusionary rule is premised upon the supposition that the answers sought to be excluded were obtained unlawfully, i.e. were compelled in violation of the interrogatee's right to remain silent . . . (However), if the compulsion to answer is lawful, the predicate for the exclusionary rule disappears, and the answers may be introduced in a criminal trial. But if the answers will be admissible in a criminal trial, the employee cannot be compelled to give them. (Appn. b, pg. 77a)

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4. At Appn. B, pg. 94a-97a, Justice Rushing discusses the danger of placing in the hands of every public employee/official interrogator the power to confer use immunity, including the possibility of intentional interference with the future prosecution of fellow employees.

Justice Rushing likens the reliance on the exclusionary rule as described above to an Epimenidean Paradox. Justice Baxter of the California Supreme Court dismisses this reasoning, citing to *Chavez v. Martinez*, *supra*, which held that the mere act of interrogation does not create a claim under 42 U.S.C. § 1983 for a Fifth Amendment violation. However, compulsion combined with interrogation in violation of the "prophylactic rules" designed to protect the Fifth Amendment involves actual deprivation. Mr. Spielbauer has been fired. Giving license to a public employee supervisor to compel the statement of his subordinate over a valid Fifth Amendment objection, and firing him for the subordinate's refusal to speak is unlawful. Just because the supervisor's disregard of the prophylactic rules or laws of immunity creates a grievance on the part of the employee to invoke the exclusion of the statements at a later trial does not replace the immunity. Rather it renders the very prophylactic rules, originally created to be a shield, into a sword to be used against the employee. It leaves the employee the obligation to assert, on his own, his rights in a later trial and to affirmatively claim his protection against the statement forced from him. Until and unless he so claims his rights in the later proceeding, neither the court nor the prosecutor has agreed to respect them. As this Court observed in *Maness v. Meyers*, *supra*, there is no guarantee that such a compelled statement will be put back in the bag from which it escaped. Artful and forceful prosecution, waiver issues, and the expense of defense, put public employee at a substantial disadvantage in enforcing his or her rights.

ADDITIONAL FACTUAL BACKGROUND

While engaged in argument on *in liminae* motions on January 27, 2003, Petitioner Spielbauer, a public defender with over twenty years experience, argued exceptions to the hearsay rule, some of which were based upon the unavailability of the witness. In doing so Mr. Spielbauer failed to disclose to the trial judge, the Honorable Paul Teilh,[5] a chance meeting with the witness two days before attempting to admit the hearsay statement. When this was brought to light by the arrest of the witness two days later, January 29, 2003, accusations of deception were vociferously made by the deputy district attorney. While forwarding a complaint to his supervisor at the Public Defender's office which instigated a disciplinary investigation, the District Attorney's office contemporaneously commenced the consideration of criminal charges against Mr. Spielbauer. Although at the *in liminae* proceedings, and in a later hearing, Judge Teihl on the record and in an order stated that he found no deception on Mr. Spielbauer's part, Mr. Speilbauer was criminally charged with a violation of California Business and Professions Code Section 6128 (deception of the court).[6]

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5. Judge Teilh is one of the most respected jurists in Santa Clara County. A former county recorder, General of the Army, and jurist of many decades of experience, his work ethic, honesty, and knowledge are held in high regard by both the bench and bar alike.

6. Mr. Spielbauer was political activist, critical of the public defender's administration and viewed the response to his actions as motivated by more than his actions warranted. These (Cont'd)

When interviewed by the Public Defender's office in an administrative investigation three months after the events before Judge Teihl, Mr. Spielbauer, having been informed of the intent of the District Attorney to prosecute a case against him, asserted his Fifth Amendment privilege on advice of counsel. The interview was convened and re-convened three times over the space of a month, March 26, April 1, and April 10, 2003. His employer made no provision to obtain use immunity for Mr. Spielbauer's compelled statements, yet terminated him for insubordination.

The Public Defender had charged Mr. Spielbauer with violation of the Public Defender's own policy against deception. Joe Guzman, Mr. Spielbauer's immediate supervisor, together with Elaine Bolster, an investigator for the office of the Public Defender, attempted the interviews. On each of those three dates, Mr. Spielbauer, who was represented by counsel, Zacharias Ledet, objected to giving a statement on the basis of his Fifth Amendment Privilege. On each occasion, Mr. Guzman first advised Mr. Spielbauer of his right to remain silent, then indicated that Mr. Speilbauer's statements would not be used against him in any criminal proceeding, but that refusal to answer would lead to termination.

(Cont'd)
suspicions were reinforced by the failure of his employer to consider the opinion of Judge Teilh, who was not contacted in the investigation (see Appn. E, Judge Tiehl's findings following being informed of the action taken by the public defender). The criminal case brought by the district attorney was later dismissed by a stipulation, in exchange for monetary contempt sanction of $750.

No one from the Public Defender's Office, nor Mr. Guzman or Ms. Bolster made any attempt to obtain any affirmative grant or agreement of immunity to protect Mr. Spielbauer's statements.

Mr. Spielbauer appealed his termination to the administrative tribunal of the Santa Clara County Personnel Board. Following a hearing, the termination for insubordination was upheld. Mr. Spielbauer appealed the decision by filing an action in California Superior Court seeking review by administrative mandamus, California Code of Civil Procedure 1094.5, contending that his termination was in violation of his Fifth Amendment right to not be forced to give testimony in the administrative interview that could be used against him in a later criminal proceeding. The California Superior Court, Judge James Kleinberg, denied his request for a writ (Appn. C, pg. 155a-156a). The California 6th Appellate District Court of Appeals reversed. On petition by the County of Santa Clara for review, the California Supreme Court reversed the decision of the 6th Appellate District.

REASONS FOR GRANTING THE PETITION

1) There exists confusion as to this Court's position of the affirmative grant of immunity.

The California Supreme Court in the opinion delivered by Justice Baxter stated,

> The United States Supreme Court has been **less than clear** about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for non-penal use. (Appn. A, pg. 13a) (emphasis added)

The United States Supreme Court has been steadfast in its assertion that protection of the privilege against self incrimination is applicable in non criminal and administrative settings, and has plainly stated,

> A witness protected by the privilege may **rightfully refuse to answer unless and until he is protected** at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. (*Lefkowitz v. Turley*, supra, 414 U.S, at p. 78; Appn. B, pg 60a) (emphasis added)

However, cases, such as *Chavez v. Martinez, supra*, were quoted for support in both the opinions of Justice Rushing of the 6th Appellate District and Justice Baxter of the California Supreme Court. The litany of federal

circuit court cases (Appn. A, pg. 26a), cited in the California Supreme Court opinion, reflect some of the confusion by the districts in applying the law. The issue was raised in the 9th, 11th and 4th Circuits without the witness even being forced to speak [*Aguilera v. Baca* (9th Cir. 2007) 510 F. 3d 1161; *Harrison v. Wille,* 132 F. 3d 679 (11th Cir. 1998); *Wiley v. Mayor and City Council of Baltimore*, 48 F 3d 773 (4th Cir. 1995)]. The cases fell more closely into the holding in *Chavez v. Martinez, supra*, and had nothing to do with employee discipline for refusing to speak over a Fifth Amendment objection. In *Harrison v. Wille* the witness complained because he was not compelled to speak. In *Arrington v. County of Dallas*, 777 F.2d 1492 (5th Cir. 1992), giving the *Miranda* warning was considered an attempt to force a waiver of immunity (*Id.* at pg. 1446).

This Court should clarify the issue, clouded to some degree by the Second Circuit opinion in *Sanitation Men II.*

2) There is no factual basis to relegate public employees to a lower standard of Constitutional rights. No one questions the right of a public employer to question an employee in an investigation. However, if the employee raises a valid Fifth Amendment objection, he should be entitled to stand mute unless and until an affirmative grant of immunity is supplied. If no immunity is sought, and the employer disciplines him in the absence of his statement, then that would be a normal course of events. Criminal cases are routinely prosecuted without the confession of the defendant. Employee discipline may similarly result in sustained discipline, especially in view of a lower burden of proof

than a criminal case. See *Harrison v. Wille, supra,* for an example. The employee was disciplined on nine counts of wrongdoing with no statement at all from the employee (*Id.* at pg. 681). In public employee discipline evidence from third party sources, and circumstantial evidence comprise the initial allegations against an employee. In this case the report of the deputy district attorney and the trial court's transcript formed the case against Mr. Spielbauer. Obtaining a confession from him three months later was not essential to make a case against him. In *Harrison v. Wille, supra,* at 681, the investigation involved two interviews and lasted over a year before discipline was imposed. In *Hester v. City of Milledgeville,* 777 F.2d 1492 (1985), cited in the California Supreme Court opinion (Appn. A, pg. 26a), the city council had time to pass an ordinance to randomly administer polygraphs to firefighters to inquire of their alleged drug use, as did the legislature in *Garrity v. New Jersey, supra,* which commissioned the attorney general to conduct the investigation. In *Lefkowitz v. Turley, supra,* a grand jury was commissioned as in many other cases. In *Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation of the City of New York, supra,* the employees were brought before a commissioner after the initial investigation produced evidence of wrongdoing. Similar time-lines occur in all public employment cases, as investigations are carried out methodically over time, just as they were here. There is no exigency to require public employees to hurriedly be thrown upon the alter of confession. Indeed the very existence of the property rights under civil service requires the methodical progression of due process.

The cases in which an issue of immunity becomes material are only those of the most grievous nature involving criminal conduct by an employee. Routine discipline is not impacted. Accordingly, public employers may proceed to action on disciplinary issues without a statement from the employee. If it involves criminal wrongdoing and the employee statement is sought, employers have the time to obtain an affirmative grant of immunity.

3) Exclusion is not an adequate remedy for a public employee. This Court's decision in *Maness v. Meyers, supra,* at page 462, stated,

> Laying to one side possible waiver problems that might arise if the witness followed that course [relying on exclusion],we nevertheless cannot conclude that it would afford adequate protection. Without something more 'he would be compelled to surrender the very protection which the privilege is designed to guarantee.' (quoted by Justice Rushing, Appn. B, pg. 63a)

Here the witness is a deputy public defender, an attorney experienced in criminal law. Irrespective of warnings to him by non attorney supervisors, and investigators, he might well be held to a waiver of his rights by speaking ["disclosure of a fact waives the privilege as to details," *Rogers v. U.S.,* 340 U.S. 367, 442 (1951); see also *United States v. Monia,* 317 U.S. 424, 427 (1943); *Minnesota v. Murphy,* 465 U.S. 420, 427 (1984)]. Waiver will be judged in hindsight based upon what the witness ". . . should reasonably have known . . ." [*U.S. v. Premises Known as 281 Syosset*

Woodbury Road,71 F. 3d 1067, 1072 (1995)]. In subsequent criminal proceedings, the witness would be forced to make a motion to suppress, not only the statement, but other evidence he may speculate was obtained as a result of the disclosure. Although the burden rests on the prosecution many nuances of such motions may be troublesome to defense counsel (*Burdeau v. McDowell*, 256 U.S. 465 (1921); *People v. Gwillim*, 223 C. A. 3d 1254 (1990)). Obtaining agreement of the prosecution through an immunity agreement prior to giving the testimony secures its protection in advance, instead of forcing the witness to rely upon the expectation of trial or appellate motion success, financed on his own, or through the public defender. The reality is a lesser level of protection.

4) Automatic public employee immunity is bad public policy and interferes with prosecutorial discretion. It violates the legislative directives behind immunity statutes (*Pillsbury Co. v. Conboy*, *supra*, 261, 262). This same California Supreme Court that has ruled in this case that every public employee supervisor can confer immunity, went into substantial discussion explaining the policy behind restriction of a trial court's ability to offer immunity to a defense witness. The Court explained that use immunity without prosecutorial acquiescense can undermine ". . . the administration of justice by inviting cooperative perjury among law violators" (*People v. Stewart*, 33 Cal. 4th 425, 468 (2004)). "Use immunity would have substantially burdened . . ." the prosecution (*Id.* pg. 470). It would have facilitated perjury, ". . . and at the same time substantially limited the prosecution ability to conduct a full and free ranging cross-examination . . ." of the witness at trial

(*Id.* pg. 470). California has long recognized the need to include the prosecution in any decision to confer use immunity [*People v. Cooke*, 16 C.A. 4th 1361, 1370 (1993); *Daly v. Superior Court*, 19 Cal 3d 132 (1977)]. As Justice Rushing put it, "[p]rosecutors faced with a claim of immunity "taint" have not always fared so well" [Appn. B, pg. 94a-96a, citing to, amongst others, *United States v. Hubbell*, 530 U.S. 27 (2000)].

> [T]he power to 'immunize' coworkers' statements may be used by unscrupulous investigators to shield friends and colleagues from criminal sanctions [Appn. B, pg. 93a, quoting from, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. Law Rev. 1309, 1334-1335 (2001)].

There is no good reason to leave to a public employer supervisor, the decision to grant immunity to a witness. The absence of disclosure to, and assent from the appropriate prosecutor is an interference in the prosecutor's lawful discretion.

Again it must be remembered that this case and others like it, arise only in the setting of the commission of a criminal offense. These are the circumstances of the most serious of public employee discipline. It is nearly impossible to postulate a single circumstance where the public interest could be served by failing to notify and obtain the acquiescense of the prosecutor before conferring immunity (or the right to exclusion), upon a witness by compelling him to answer. Public employee discipline, in cases of criminal conduct, should not be carried out in back rooms to be excluded from

public scrutiny and without exposure to the appropriate prosecutor. When public and prosecutorial scrutiny is called for, there is no good reason to avoid the appropriate participation by the prosecutor in the decision of whether to grant use immunity to the witness forcing the witness to testify over his/her asserted Fifth Amendment privilege not to speak.

CONCLUSION

Mr. Spielbauer was entitled to stand upon his right not to speak, upon the grounds that the questions sought information that may be later used against Mr. Spielbauer in a criminal prosecution. This United States Supreme Court has never held that there is automatic immunity arising from the compelled statements of a public employee. Certainly, the prophylactic protection of an exclusionary rule has been held to further insure the sanctity of the Fifth Amendment rights of public employees, officers and contractors, but that is not the same, and should not be conflated with the obligation of employers to provide for an affirmative grant of immunity before compelling an employee to speak over his or her Fifth Amendment objection. The California Supreme Court is wrong in relegating public employees to a lesser degree of protection than others, and no good public policy warrants such differential treatment. Indeed, it impairs prosecutorial discretion and strategy in cases of high public interest. This Court should grant *certiorari* because the lack of a holding directly upon the issue, instead of arising from facts that involve both

compulsion and waiver of immunity which has led to confusion on the part of many courts, including the California Supreme Court which stated in its opinion,

> The United States Supreme Court has been less than clear about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for non-penal use (Appn. A, pg. 13a).

Petitioner believes that the mandate laid out by this high Court for a prior grant of immunity is more clearly resolved in his favor, however, the holding of the California Supreme Court testifies to the contrary.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF CALIFORNIA FILED FEBRUARY 9, 2009

IN THE SUPREME COURT OF CALIFORNIA

S150402

Ct.App. 6 H029345

Santa Clara County
Super. Ct. No. CV031889

THOMAS SPIELBAUER,

Plaintiff and Appellant,

v.

COUNTY OF SANTA CLARA et al.,

Defendants and Respondents.

Plaintiff, a deputy public defender, was investigated by his employer, the county, upon allegations that he had made deceptive statements to the court while representing a criminal defendant. During each of several attempts to interview plaintiff in the matter, a supervising attorney directed plaintiff to answer questions about the incident, told plaintiff that his refusal to cooperate would be deemed insubordination warranting discipline up to and including dismissal, *but advised plaintiff–accurately–that no use in a criminal proceeding (i.e., criminal use) could be made of his*

answers. Nonetheless, on advice of counsel, plaintiff declined to answer, invoking his privilege against compelled self-incrimination under both the federal and state Constitutions. (U.S. Const., 5th Amend., cl. 3; Cal. Const., art. I, § 15.) He was terminated from employment on grounds of the deceptive court conduct, and for disobeying the employer's orders to answer questions.

Plaintiff sought mandate to obtain reinstatement, urging, among other things, that he could not be compelled, on pain of dismissal, to answer potentially incriminating questions unless he received, in advance, a formal grant of immunity from direct or derivative use of his answers in any criminal case against him. The trial court upheld the termination, but the Court of Appeal reversed. The appellate court found substantial evidence that plaintiff had engaged in deceptive court conduct. However, it agreed with plaintiff's contention that, having invoked his constitutional right against self-incrimination, he could not be compelled, by threat of job discipline, to answer his employer's questions unless his constitutional privilege was first supplanted by an affirmative grant of criminal use immunity coextensive with the constitutional protection. We granted review to address the latter issue.

We conclude that the Court of Appeal erred. United States Supreme Court decisions, followed for decades both in California and elsewhere, establish that a public employee may be compelled, by threat of job discipline, to answer questions about the employee's job

performance, so long as the employee is not required, on pain of dismissal, to *waive* the constitutional protection against criminal use of those answers. Here, plaintiff was not ordered to choose between his constitutional rights and his job. On the contrary, he was truthfully told that, in fact, no criminal use could be made of any answers he gave under compulsion by the employer. In the context of a noncriminal public employment investigation, the employer was not further required to seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to that investigation.

Accordingly, we will reverse the judgment of the Court of Appeal.

FACTS AND PROCEDURE

In January 2003, plaintiff, a Santa Clara County deputy public defender, represented Michael Dignan on charges of ammunition possession by a felon. Troy Boyd had been arrested with Dignan, but not detained. Plaintiff proposed to introduce, on Dignan's behalf, Boyd's statement to the police that his parents owned the house where the ammunition was found, and he had rented it since he was 19 years old. The apparent purpose of the proffered statement was to raise a reasonable doubt about control of the area in which the contraband had been discovered. But the statement's efficacy for that purpose depended, as the Court of Appeal noted, on its "ambiguity and incompleteness"; as Boyd later explained, he did rent the house from his

parents, but he sublet portions of it to others, including Dignan. Thus, if Boyd were cross-examined on the witness stand, the true context of his statement would likely be revealed.

The prosecutor moved in limine to exclude Boyd's extrajudicial statement as inadmissible hearsay. A hearing on the motion took place on Monday, January 27, 2003, before Judge Tielh. The prosecutor argued the defense could not claim Boyd's unavailability as the basis for a hearsay exception, because there was no evidence the defense had exercised due diligence to procure Boyd's presence at trial. When the court asked plaintiff what hearsay exception would apply, plaintiff said he had not sent out an investigator to look for Boyd in part because "Mr. Boyd has a warrant for his arrest. And if the San Jose Police are not going to be able to find Mr. Boyd, I think that my investigator is going to be very hard put to find an individual who is avoiding contact with anybody that has to do with the judicial system."

Plaintiff presented a $5,000 warrant for Boyd and argued that this met his burden of showing Boyd was unavailable. Plaintiff urged that exclusion of Boyd's statement would deprive his client of a critical defense. Plaintiff further represented that Boyd had experienced problems with the law and avoided all contact with authority figures. Ultimately, the court ruled in limine that Boyd's hearsay statement would be admitted.

Plaintiff then requested the jury be instructed that Boyd was a fugitive, so jurors would not wonder why he had failed to call Boyd. When the prosecutor remarked that this was a good question, because plaintiff had exerted no effort to find Boyd, plaintiff responded that he wanted to tell the jury he had not done so because "[Boyd's] got a warrant for his arrest and he's ducking." Plaintiff indicated he intended to move the arrest warrant into evidence in order to explain Boyd's absence.

Three days after this court hearing, a police sergeant went to the house in question, where he found Boyd. Boyd told the officer he had recently spoken to "a public defender investigator." Confronted in court with this information, plaintiff indicated it was he who had spoken with Boyd. Plaintiff related that on Sunday, January 26, 2003–the day before he claimed in court that Boyd was an unavailable fugitive–he went to the house to take photographs, where he found Boyd with a group watching the Super Bowl. According to plaintiff, he carried no subpoena because he did not expect Boyd to be there. Plaintiff also said Boyd had indicated he would not cooperate in being served and did not wish to testify. Plaintiff maintained that his accidental encounter with Boyd was "attorney work product," which he had no obligation to disclose.

The prosecutor argued that plaintiff had made an affirmative misrepresentation to the court. Without ruling on this assertion, the court, per Judge Tielh, determined that Boyd was an available witness, and that

this would be considered in passing upon any trial objection to the admission of Boyd's hearsay statement.

In late February or early March 2003, Chief Assistant Public Defender David Mann learned of this incident. Mann was told that the prosecutor in the Dignan case was getting transcripts in the matter and wanted "to 'go after' [plaintiff] in some fashion." When Mann contacted the district attorney's office, he was advised that three options were being considered–to file misdemeanor charges against plaintiff, to report him to the State Bar, or to "leave it to [the Public Defender's] office to handle."

Deciding not to wait for the district attorney's decision, Mann initiated an internal investigation.[1] On April 1, 2003, plaintiff appeared with his counsel, Zacharias Ledet, for an interview in the matter. Also present were Joe Guzman, supervisor of the felony division of the public defender's office, and a departmental investigator, Alayne Bolster. When Bolster asked plaintiff to describe his conversation with Boyd, Ledet interjected that plaintiff refused to answer on grounds of protection afforded him by the federal and state Constitutions and the laws of California.

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1. In May 2003, the district attorney did file a misdemeanor complaint charging plaintiff with a deceit upon the court in violation of Business and Professions Code section 6128. As the Court of Appeal related, "[a]lthough the present record is incomplete on this point, plaintiff asserts that the action was ultimately dismissed by stipulation."

Guzman responded by addressing the following to plaintiff: "Tom, you have a right to remain silent and not incriminate yourself. Your silence, however, may be deemed insubordination, leading to administrative discipline up to and including termination. *Any statement made during this interview cannot, and I emphasize cannot, be used against you in any subsequent criminal proceeding.*" (Italics added.)

Ledet retorted that the protection against penal use asserted by Guzman only applied to peace officers, and that Guzman's advisement thus afforded plaintiff no protection "unless you receive a ruling from a Court of Law." Guzman then stated he wanted to "make clear that this is not a criminal proceeding. . . . This is an employee investigation. . . . What we do here stays within the Public Defender's Office. This is not going to be sent to the DA's Office, okay. What I'm saying is, . . . anything you say at this meeting cannot be used against you in a criminal proceeding. So you are directed to answer the questions and your refusal to answer the questions will be deemed as insubordination." These points were reiterated in full later in the interview. Through Ledet, plaintiff continued to object.

A second interview, with Ledet present, occurred on April 10, 2003. Guzman advised that, because this was an internal investigation, plaintiff "[did] not have a right to refuse to answer," and that such refusal would be insubordination warranting discipline up to and including termination, but that "any information [plaintiff] provides in this particular interview cannot

and will not be used against him in a criminal case." Ledet responded that Guzman had provided no authority for his assurances, and that cases cited in correspondence between the parties were concerned only with peace officers.

At the conclusion of this meeting, Ledet asserted that Guzman had exhausted his right under governing personnel policies to interview plaintiff, and that further efforts to do so "would be unreasonable." Ledet further stated that plaintiff would continue to invoke his rights not to answer.

On June 9, 2003, Mann recommended plaintiff's termination on three civil service grounds: (1) insubordination (stemming from plaintiff's refusal to answer investigators' questions), (2) gross misconduct unbecoming a county officer (stemming from the Dignan incident), and (3) seeking, in violation of office rules governing attorney ethics, to mislead a court by artifice or false statement. Plaintiff sought a prediscipline administrative hearing. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215, 124 Cal.Rptr. 14, 539 P.2d 774.) The hearing officer sustained the charges and discipline, as did the county personnel board.

Plaintiff sought mandamus relief in the superior court. Among other things, he insisted he could not be dismissed for refusing, on grounds of his constitutional right against self-incrimination, to answer his employer's potentially incriminating questions unless he received, in advance, a formal grant of criminal use immunity. The

court denied the petition, ruling that substantial evidence supported the charges and discipline, and that defendant was not entitled to formal immunity before being compelled to answer his employer's questions.

The Court of Appeal reversed. The appellate court found substantial evidence supporting the charge that plaintiff's representation of Dignan involved deceptive conduct unbecoming a county officer and tending to discredit his office.[2] However, the court agreed with plaintiff's contention that a public employee must receive a formal grant of criminal use immunity before being required, on pain of discipline, to answer potentially incriminating official questions about his or her job performance.

Hence, the Court of Appeal held, the employer's mere advisements and assurances that plaintiff's statements could not be used criminally were insufficient to permit compulsion of his answers. The discipline imposed, the court noted, was based in part on a finding-legally erroneous in the court's view–of plaintiff's insubordination for refusing to answer, and it was not clear he otherwise would have been terminated. Accordingly, the Court of Appeal reversed the superior court's judgment with directions to issue a writ of mandamus directing the county personnel board to

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2. The Court of Appeal also found unmeritorious plaintiff's claims that he was denied an impartial decision maker because both his *Skelly* hearing officer and the county personnel board were burdened by conflicts of interest. Those issues are not before us.

vacate and reconsider its decision in light of the views expressed.

We granted review, limited to the following issue: When a public employee invokes his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from any criminal use of the employee's statements before it can dismiss the employee for refusing to answer questions in connection with the investigation?[3] Turning to that question, we conclude that the answer is no.

DISCUSSION

The Fifth Amendment to the United States Constitution declares that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself. . . ." (Italics added.) The California Constitution similarly provides that "[p]ersons may not . . . be

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3. Amicus curiae briefs addressing this issue have been filed in support of respondent county by (1) the Attorney General of California, (2) the County of Los Angeles, (3) the Sacramento County District Attorney, (4) the Peace Officer Research Association of California Legal Defense Fund, (5) the California State Sheriffs Association and the California Police Chiefs Association, and (6) the California League of Cities, the California State Association of Counties, the California School Boards Association and its Education Legal Alliance, and the California Public Employers Labor Relations Association. The California Teachers Association has filed an amicus curiae brief in support of plaintiff.

compelled *in a criminal cause* to be a witness against themselves. . . ." (Cal. Const., art. I, § 15, italics added.)

The constitutional guarantee against compelled self-incrimination protects an individual from being forced to testify against himself or herself in a pending criminal proceeding, but it does more than that. It also privileges a person not to answer official questions in any other proceeding, "civil or criminal, formal or informal," where he or she reasonably believes the answers might incriminate him or her in a criminal case. (*Lefkowitz v. Turley* (1973) 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (*Turley*); see *Kastigar v. United States* (1972) 406 U.S. 441, 444-445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (*Kastigar*).) One cannot be forced to choose between forfeiting the privilege, on the one hand, or asserting it and suffering a penalty for doing so on the other. (*Malloy v. Hogan* (1964) 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653.)

In many instances, of course, it is necessary or highly desirable to procure citizens' answers to official questions, including their formal testimony under oath. In such circumstances, an individual's invocation of the privilege against self-incrimination would frustrate legitimate governmental objectives. In light of the competing interests, it is well established that incriminating answers may be officially compelled, without violating the privilege, when the person to be examined receives immunity " coextensive with the scope of the privilege"–i.e., immunity against both direct and "derivative" criminal use of the statements. (*Kastigar,*

supra, 406 U.S. 441, 449-462, 92 S.Ct. 1653; see *Murphy v. Waterfront Comm'n* (1964) 378 U.S. 52, 54, 84 S.Ct. 1594, 12 L.Ed.2d 678.) In such cases, refusals to answer are unjustified, "for the grant of immunity has removed the dangers against which the privilege protects. [Citation.]" (*Kastigar, supra,* at p. 449, 92 S.Ct. 1653.)

Official compulsion, for purposes of the privilege, is not limited to court process, and may include a public employer's threat to dismiss an employee for refusing to answer potentially incriminating questions. (*Garrity v. New Jersey* (1967) 385 U.S. 493, 496-497, 87 S.Ct. 616, 17 L.Ed.2d 562 (*Garrity*).) Thus, the law is clear that incriminating answers coerced from a public employee under threat of dismissal *cannot be used against the employee in a criminal proceeding.* (*Id.,* at p. 500, 87 S.Ct. 616.) This is so even where the employee received no advance grant of formal immunity. (See *id.,* at p. 495, 87 S.Ct. 616.)

On the other hand, the constitutional privilege against compelled self-incrimination in a *criminal* case or cause (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15) does not protect against the *nonpenal* adverse use of officially compelled answers. (E.g., *Segretti v. State Bar* (1976) 15 Cal.3d 878, 886-887, 126 Cal.Rptr. 793, 544 P.2d 929; *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 426, 27 Cal.Rptr.2d 204.) Thus, incriminating answers given by a public employee under threat of job sanction for refusal to answer may themselves form the basis for job discipline, including termination, so long as the employee has requisite protection against the criminal use of such statements.

Appendix A

The United States Supreme Court has been less than clear about the minimum circumstances under which one may be officially compelled, over his or her constitutional objection, to give incriminating answers for nonpenal use. In *Adams v. Maryland* (1954) 347 U.S. 179, 74 S.Ct. 442, 98 L.Ed. 608 (*Adams*), a federal statute provided that testimony before a congressional committee could not be used criminally against the witness. Nonetheless, the defendant, who had been summoned to answer questions before a Senate investigating committee, was convicted of Maryland charges on the basis of his confession before the committee that he ran a gambling business in that state.

Seeking to uphold the conviction, the state urged, among other things, that the defendant had waived the statutory protection by failing, before the committee, to claim his constitutional privilege against self-incrimination. The high court responded that "no language of the [statute] requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him of a crime." (*Adams, supra,* 347 U.S. 179, 181, 74 S.Ct. 442.) Indeed, the court noted, such an interpretation would render the statute superfluous, for "a witness does not need any statute to protect him from the [criminal] use of self-incriminating testimony he is compelled to give over his objection. *The Fifth Amendment takes care of that without a statute.*" (*Ibid.*, italics added.)

However, other Supreme Court cases contain language that might suggest that one subjected to

coercive official questioning in a noncriminal setting may insist on the constitutional privilege, without fear of sanction, until the privilege is supplanted, and thus removed, by the authorized grant or conferral of an "immunity" coextensive with the privilege itself. (E.g., *Chavez v. Martinez* (2003) 538 U.S. 760, 771, 123 S.Ct. 1994, 155 L.Ed.2d 984 (plur. opn. of Thomas, J.) (*Chavez*) [witness may insist on immunity agreement before being compelled to give testimony in noncriminal case]; *Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 806, 97 S.Ct. 2132, 53 L.Ed.2d 1 (*Cunningham*) ["government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"]; *Turley, supra,* 414 U.S. 70, 78, 94 S.Ct. 316 ["witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant"]; *Stevens v. Marks* (1966) 383 U.S. 234, 246, 86 S.Ct. 788, 15 L.Ed.2d 724 [witness has "constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him"].)

Several cases have squarely held that persons could not be sanctioned when, in noncriminal proceedings, they invoked the constitutional privilege to refuse to answer official questions, or to produce materials potentially subject to the privilege, even though they received official assurances that no criminal use of the

evidence sought was contemplated, and even though they could move to suppress the evidence produced if the prosecution later attempted such criminal use. (E.g., *Maness v. Meyers* (1975) 419 U.S. 449, 452, 461-463, 95 S.Ct. 584, 42 L.Ed.2d 574 [one served with subpoena for production of sexually explicit magazines as evidence for civil injunction against distribution of obscene materials was not required to let "cat out of the bag" before testing whether his invocation of Fifth Amendment privilege was valid]; but see *id.*, at p. 475, 95 S.Ct. 584 (conc. opn. of White, J.) [formal immunity is "functional equivalent" of rule that neither incriminating answers nor their fruits can be used criminally]; see *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (*Doe*) [before compelling citizen's production, over Fifth Amendment objection, of potentially incriminating business records for nonpenal purpose, government must follow strict procedures of statute allowing United States Attorney to seek court-conferred criminal use immunity; prosecutor's informal promise not to use materials criminally is insufficient; statute is intended to require government to balance interest in obtaining material against risk of hindrance to future prosecution if immunity is granted]; *Pillsbury Co. v. Conboy* (1983) 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (*Conboy*) [deponent questioned in civil case about content and truth of his previously immunized federal grand jury testimony could not be held in contempt for invoking Fifth Amendment rights at deposition; deponent was not required to rely on mere predictive judgment that, in any subsequent criminal prosecution against him,

court would suppress civil deposition testimony as covered by prior immunity]; see also *Marchetti v. United States* (1968) 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (*Marchetti*) [professional bookmaker subject to special tax on proceeds of illegal wagering could not be convicted of violating registration provisions of Internal Revenue Code over defense that compliance would require self-incrimination; Supreme Court would not clear way for enforcement of registration provisions by judicially imposing restrictions on criminal use of information derived, since Congress, not courts, should balance criminal versus revenue-producing uses of registration requirement]; cf. *Byers v. Justice Court* (1969) 71 Cal.2d 1039, 80 Cal.Rptr. 553, 458 P.2d 465 (*Byers*) [absent prior judicial rule conferring criminal use immunity, one involved in auto collision could not be convicted for leaving accident scene without disclosing self-identifying information, as required by hit-and-run law; though purpose of disclosure statute was to protect accident victims from financial loss, required disclosures were potentially self-incriminatory].)[4]

California statutes set forth various circumstances in which persons whose potentially incriminating

4. The judgment in *Byers* was vacated, and the cause remanded, in *California v. Byers* (1971) 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9. The high court majority held that facially neutral disclosure requirements contained in regulatory statutes such as California's accident-disclosure law, where the criminal implications are not substantial, do not violate the Fifth Amendment.

statements are required for reasons other than criminal prosecution are, or may or must be, afforded immunity from the criminal use of, or prosecution for, the immunity matters discussed in their compelled answers. (See, e.g., Pen.Code, § 1324 [prosecutor may request judicial immunity for witness in felony proceeding]; Gov.Code, § 3253, subd. (e)(1), as added by Stats.2007, ch. 591, § 2 [firefighter must receive formal written offer of criminal transactional immunity before being required to answer employer's incriminating questions]; *id.*, §§ 18676, 18677 [one called to testify in civil service investigation by State Personnel Board cannot be excused on grounds of self-incrimination privilege if granted criminal transactional or use immunity]; *id.*, § 83119 [one compelled, over self-incrimination objection, to testify before Fair Political Practices Commission has criminal transactional immunity with respect to matters disclosed]; Corp.Code, § 25531, subd. (e) [person compelled, over self-incrimination objection, to testify before Corporations Commissioner in securities-fraud investigation has criminal transactional immunity with respect to matters disclosed].)

Plaintiff and the Court of Appeal thus have derived the premise that "immunity," on the one hand, and the right to exclusion from evidence in a subsequent prosecution, on the other, are two separate concepts that may not be conflated. As the Court of Appeal reasoned, one subjected to coercive official questioning in a noncriminal setting is constitutionally privileged to *refuse to answer unless personally immunized*, and, if personal immunity is denied, or is unavailable from an

authorized source, the person *cannot be sanctioned* for *remaining silent,* but if one *does* speak under official compulsion, without the protection of formal immunity, the Constitution nonetheless prohibits direct or derivative use of the statements in a criminal prosecution against the declarant.

Whatever the general merits of this principle, federal and California courts have taken a different tack in cases involving noncriminal investigations of the job performance of public employees. Given the paramount duty of public employees to their employers, and the importance of ensuring the proper performance of public duties, the decisions consistently indicate that a public employee may be compelled, upon threat of job discipline, to answer questions about his or her job performance, so long as the employee is not also required to *surrender* the constitutional privilege against criminal use of any statements thereby obtained.

As we will explain, the United States Supreme Court has explicitly stated that the Fifth Amendment does not prevent a public employer from disciplining an employee who refuses to answer official job-related questions, where there is no further requirement that the employee forfeit the privilege against self-incrimination and agree that the answers thus compelled may be used in a criminal prosecution against the employee. The court has never held, in the context of a noncriminal investigation of public employee job performance, that an employee must be offered *formal immunity* from criminal use before being compelled, by threat of job discipline, to answer questions on that subject.

Appendix A

Lower federal courts, and California courts other than the instant Court of Appeal, have thus consistently concluded that the Constitution does not require a public employer to obtain and provide an affirmative grant of criminal use immunity before using the threat of job discipline to compel answers from its employee in the course of an investigation of job performance. Rather, these cases hold, the employee may be punished for refusal to answer the employer's job-related questions if he or she is not required to *surrender* the constitutional privilege against criminal use of the statements thereby obtained. Over four decades, the Supreme Court has declined numerous opportunities to overturn these decisions. No reason appears to depart from the rule thus well established.

Thus, in *Garrity,* police officers were questioned by the state attorney general's office, which was acting pursuant to broad court-conferred authority to investigate the fixing of traffic tickets. A state statute called for the forfeiture of public employment by one who invoked the Fifth Amendment, or refused to waive immunity, in response to official questioning about his or her job performance. Accordingly, each officer was warned that anything he said could be used against him in a criminal prosecution, that he could refuse, on grounds of his constitutional privilege, to provide self-incriminating answers, but that if he did so, he would be dismissed. In other words, the officers were told that unless they waived their constitutional right against self-incrimination, they would lose their jobs.

Though preserving their constitutional objections, the officers answered, and their answers were used to convict them of conspiracy to obstruct administration of the traffic laws. Deeming the answers coerced, the high court reversed the convictions, holding that the Fifth Amendment right against self-incrimination, as incorporated in the Fourteenth Amendment, "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . . ." (*Garrity, supra,* 385 U.S. 493, 500, 87 S.Ct. 616.)

Subsequent to *Garrity,* in two cases decided the same day, the high court provided additional insight about the Fifth Amendment rights of public employees under investigation in connection with their job performance. In the first case, *Gardner v. Broderick* (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (*Gardner*), a New York City police officer subpoenaed before a grand jury prior to the *Garrity* decision was asked to sign a waiver of his privilege against self-incrimination. Pursuant to provisions of the New York Constitution and the city charter, he was told his refusal to do so would lead to his discharge from public employment. When he refused to sign the waiver, he was fired, and he sought reinstatement. The state court dismissed his petition. The Supreme Court reversed, holding that the privilege against self-incrimination "does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the *immunity it confers* on penalty of the loss of employment." (*Id.*, at p. 279, 88 S.Ct. 1913, italics added.)

Arguing for a contrary result, the city sought, among other things, to distinguish *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, decided the same day as *Garrity*. *Spevack* held that an attorney could not be disbarred solely for refusing, on grounds of his privilege against self-incrimination, to testify at a disciplinary hearing. In *Gardner*, the city asserted that different considerations should apply "in the case of a public official such as a policeman." (*Gardner, supra*, 392 U.S. 273, 277, 88 S.Ct. 1913.) "Unlike the lawyer," the city argued, the public officer "is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one." (*Id.*, at pp. 277-278, 88 S.Ct. 1913.)

"We agree," the *Gardner* court responded, "that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity* with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-incrimination *would not have been a bar to his dismissal.*" (*Gardner, supra*, 392 U.S. 273, 278, 88 S.Ct. 1913, fn. & citation omitted, italics added.)

Appendix A

The second case, *Sanitation Men v. Sanitation Comm'r.* (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (*Sanitation Men I*), concerned a New York City commission's investigation, again prior to the *Garrity* decision, of suspected corrupt acts by city sanitation employees. Fifteen suspected employees were called to testify before the commission. Pursuant to the city charter, they were told that if they invoked the privilege against self-incrimination to avoid testifying about their own job conduct, or that of other employees, they would be discharged. Twelve of the employees refused to testify before the commission and, on that sole ground, were dismissed. Three answered questions, denying the charges against them. Subsequently, these three were summoned before a grand jury and asked to sign waivers of immunity. They refused, and were then dismissed for that sole reason.

The court of appeals upheld the dismissals. However, the Supreme Court reversed on the grounds elaborated in *Gardner,* holding again that the Fifth Amendment forbids dismissal from public employment for refusal to surrender the privilege against self-incrimination. Nonetheless, the high court observed, "As we stated in *Gardner* . . . , if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal *without requiring relinquishment of the benefits of the constitutional privilege,* and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would

not be at stake." (*Sanitation Men I, supra*, 392 U.S. 280, 284, 88 S.Ct. 1917, italics added.) The court made clear that public employees, like all other citizens, are entitled to the privilege against self-incrimination. Nonetheless, the court cautioned, "petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, *which do not involve an attempt to coerce them to relinquish their constitutional rights.*" (*Id.*, at p. 285, 88 S.Ct. 1917, italics added.)

As a consequence of the decision in *Sanitation Men I*, the public employees at issue in that case were reinstated. Thereafter, they were recalled to appear before a senior city sanitation official. Before being questioned on this occasion, each of the employees-all of whom were represented by counsel-was advised by the official that the employee had all rights guaranteed by New York law and the federal and state Constitutions, and that these included the right to remain silent, although refusal to answer material and relevant questions about his job conduct might subject the employee to disciplinary action. Each employee was further told, in light of *Garrity*, *Gardner*, and *Sanitation Men I*, that any answers he gave could not be used in a criminal prosecution against him, except a perjury prosecution stemming from the falsity of any answers. Beyond this advisement, the employees received no formal grant or offer of criminal immunity.

Again the employees refused to answer substantive questions about their participation in the suspected corrupt scheme. Accordingly, they were suspended and, ultimately, dismissed.

In the employees' federal reinstatement action, both parties moved for summary judgment. The district court granted the employees' motion and denied the city's. The court concluded that under New York's criminal procedure statutes, the city lacked authority to confer any form of criminal immunity necessary to supplant the Fifth Amendment privilege and permit the city to compel the employees' answers on pain of dismissal.

In *Uniformed S.M. Ass'n, Inc. v. Commissioner of S. of N.Y.* (2d Cir.1970) 426 F.2d 619 (*Sanitation Men II*), the federal court of appeals reversed. The court reasoned that there need be no statute conferring the criminal use immunity required to discharge a public employee who refuses, on self-incrimination grounds, to answer job-related questions. The court asserted that, in *Garrity,* "the very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity," and in *Adams,* the high court observed that when one is compelled to give a self-incriminating statement, the Fifth Amendment confers immunity directly, without the necessity of a statute. (*Sanitation Men II, supra,* at p. 626.)

In any event, the court noted that in *Gardner*, "Justice Fortas stated in so many words that if a public officer is asked about performance of his official duties *and is not required to waive immunity*, the privilege is not a bar to his dismissal for refusal to answer. [Justice Fortas] said nothing about a statutory grant of immunity[,] and the citation of *Garrity* [in the *Gardner* opinion] shows why nothing needed to be said. . . . The proceeding here involved no attempt to coerce relinquishment of constitutional rights, because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, . . . is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution." (*Sanitation Men II, supra*, 426 F.2d 619, 627, italics added.)

Accordingly, the federal court of appeals ordered the federal district court to enter summary judgment for the city. With only Justice Douglas's dissenting vote, the United States Supreme Court denied certiorari. (*Uniformed Sanitation Men Assn., Inc., et al. v. Commissioner of Sanitation of the City of New York, et al.* (1972) 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349.)

Consistent with *Sanitation Men II*, many lower federal court cases have since held that the Fifth Amendment does not require a formal, affirmative grant of immunity before a public employee may be dismissed for his or her blanket refusal to answer official questions about performance of the employee's public duties, so

long as the employee is not required to surrender the constitutional privilege against the direct or derivative use of his or her statements in a subsequent criminal prosecution. (E.g., *Aguilera v. Baca* (9th Cir.2007) 510 F.3d 1161, 1171-1172, cert. denied (2008) __ U.S. __, 129 S.Ct. 487, 172 L.Ed.2d 355 (*Aguilera*); *Hill v. Johnson* (8th Cir.1998) 160 F.3d 469, 471; *Harrison v. Wille* (11th Cir.1998) 132 F.3d 679, 683; *Wiley v. Mayor and City Council of Baltimore* (4th Cir.1995) 48 F.3d 773, 777, cert. denied, 516 U.S. 824, 116 S.Ct. 89, 133 L.Ed.2d 45; *Arrington v. County of Dallas* (5th Cir.1992) 970 F.2d 1441, 1446; *Hester v. City of Milledgeville* (11th Cir.1985) 777 F.2d 1492, 1496; see *Weston v. U.S. Dept. of Housing & Urban Dev.* (Fed.Cir.1983) 724 F.2d 943, 947-948 (*Weston*); *Gulden v. McCorkle* (5th Cir.1982) 680 F.2d 1070, 1073-1074, cert. denied (1983) 459 U.S. 1206, 103 S.Ct. 1194, 75 L.Ed.2d 439; *Confederation of Police v. Conlisk* (7th Cir.1973) 489 F.2d 891, 894-895, cert. denied *sub nom. Rochford v. Confederation of Police* (1974) 416 U.S. 956, 94 S.Ct. 1971, 40 L.Ed.2d 307 (*Confederation of Police*).)

California cases postdating *Garrity, Gardner*, and *Sanitation Men I*-including decisions of this court-are to similar effect. In *Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 145 Cal.Rptr. 396, a corrections officer faced administrative charges for bringing marijuana cigarettes into the prison. Questioned at his disciplinary hearing, he invoked the Fifth Amendment, and was nonetheless ordered to answer, receiving no offer of immunity in the process. He did respond under protest, admitting he carried the contraband into the

facility. He received a seven-month suspension. He sought mandamus to overturn the suspension, claiming he should have been allowed at the hearing to exercise his privilege against self-incrimination. The Court of Appeal disagreed. Citing the pertinent United States Supreme Court decisions, the court held that he could be compelled, for disciplinary purposes, to answer questions pertaining to his job performance, although no criminal use could be made of his answers. (*Id.*, at pp. 917-918, 145 Cal.Rptr. 396.)

In *Kelly v. State Personnel Bd.* (1979) 94 Cal.App.3d 905, 156 Cal.Rptr. 795, a state criminalist was terminated for refusing to provide requested information during an internal investigation of allegations that he supplied illegal drugs, including some from evidence, to a third person. He had been advised that any information he provided could not be used against him in a criminal prosecution. His petition for mandate, seeking reinstatement, was denied, and the Court of Appeal affirmed. Justice Reynoso's opinion noted that the appeal involved only associational and privacy issues, not the petitioner's Fifth Amendment rights. On the latter score, Justice Reynoso observed, "[i]t is settled that a public employee may be required to answer questions relative to his fitness for his employment if his answers cannot be used against him in a subsequent criminal proceeding. [Citation.] If the employee still refuses to answer questions relevant to his official duties then he may be dismissed. [Citation.]" (*Id.*, at p. 911, 156 Cal.Rptr. 795.)

Appendix A

In *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 221 Cal.Rptr. 529, 710 P.2d 329 (*Lybarger*), a police officer, Lybarger, was interviewed by the department's internal affairs division, which was investigating serious allegations of misconduct in his unit. He was advised that a criminal investigation was also pending, and that refusal to cooperate with the internal affairs inquiry would be insubordination, which might lead to dismissal. He was then ordered to answer questions and refused to do so. At a subsequent disciplinary hearing, he testified he acted on advice of counsel. He was terminated for disobeying the order. The superior court denied his petition for mandate seeking reinstatement.

On appeal, Lybarger asserted violations of his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov.Code, § 3300 et seq.). He pointed out that Government Code section 3304, subdivision (a) forbids "punitive action" against an officer for "lawful[ly] excercis[ing] . . . the rights granted under this chapter," which rights included, under Government Code section 3303, former subdivision (g) (now subdivision (h)), the right immediately to be informed of his constitutional rights "[i]f prior to or during the interrogation . . . it [was] deemed that he [might] be charged with a criminal offense. . . ."

Under this scheme, Lybarger asserted, he could not be disciplined solely by reason of his exercise of his constitutional right to remain silent. Moreover, he insisted, he had been denied his statutory right to be *advised* of his constitutional rights where it was "deemed" that criminal charges might be filed.

Addressing the first issue, the majority made clear that Lybarger "had neither a constitutional nor a statutory right to remain silent *free of administrative sanction.* As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. *Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding.* [Citing *Turley, supra,* 414 U.S. 70, 77-79, 94 S.Ct. 316, and *Garrity, supra,* 385 U.S. 493, 500, 87 S.Ct. 616.]" (*Lybarger, supra,* 40 Cal.3d 822, 827, 221 Cal.Rptr. 529, 710 P.2d 329, italics added.)

On the other hand, the majority then held that Lybarger's interrogators had violated his *statutory* right to an *advisement* that he had a constitutional right to remain silent, subject to disciplinary action for doing so, but that his statements obtained under threat of discipline could not be used against him in a criminal prosecution. The omission of such an advisement, the majority concluded, was prejudicial, and Lybarger's dismissal for refusing to answer questions was therefore invalid. (*Lybarger, supra,* 40 Cal.3d 822, 828-830, 221 Cal.Rptr. 529, 710 P.2d 329.)

In *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195, 252 Cal.Rptr. 817, 763 P.2d 480 (*Williams*), we addressed a similar police internal investigation involving Lybarger's partner, Officer Williams. We reiterated our conclusion that the Constitution gives a public employee no absolute right to refuse to answer incriminating employer questions, but instead

adequately protects the employee's rights by precluding use of any compelled statements in aid of a criminal prosecution. (*Id.*, at p. 199, 252 Cal.Rptr. 817, 763 P.2d 480.) Like Lybarger, Williams also claimed his statutory advisement rights had been violated. Unlike Lybarger, however, Williams had answered the questions posed to him, and had been dismissed on the basis of the incriminating information he provided. This court concluded that omission of the statutory advisement, though improper, did not warrant invalidating Williams's dismissal for admitted misconduct on duty. (*Id.*, at pp. 201-206, 252 Cal.Rptr. 817, 763 P.2d 480.)[5]

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5. As noted, *Lybarger* and *Williams* confirmed that by virtue of a *statute* applicable specifically to peace officers (Gov.Code, § 3303, subd. (h) (formerly subd. (g))), such an officer, before being required to answer an employer's investigatory questions, must be informed of his or her constitutional rights if there appears a possibility the officer will be charged with a criminal offense. (*Lybarger, supra*, 40 Cal.3d 822, 828-829, 221 Cal.Rptr. 529, 710 P.2d 329; *Williams, supra*, 47 Cal.3d 195, 200-201, 252 Cal.Rptr. 817, 763 P.2d 480.) In a concurring opinion in *Lybarger*, Chief Justice Bird argued that the right to an appropriate admonition might itself be constitutional in nature. (*Lybarger, supra*, at pp. 833-834, 221 Cal.Rptr. 529, 710 P.2d 329 (conc. opn. of Bird, C.J.).) Several federal courts of appeal have suggested that, although the federal Constitution does not require *formal immunity* for public employees before they must answer their employers' questions, it may require appropriate *advisements* that the compelled answers may not be used against the employees in criminal prosecutions. (See, e.g., *Weston, supra*, 724 F.2d 943, 948; *Confederation of Police, supra*, 489 F.2d 891, 894; *Sanitation Men II, supra*, 426 F.2d 619, 627; but see *Aguilera, supra*, 510 F.3d 1161, 1172, fn. 6.) We need not decide that issue here, however, for it is undisputed that such advisements were given in the case at hand.

Finally, in *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 227 Cal.Rptr. 90, 719 P.2d 660 (*Long Beach*), we addressed a statute requiring every nonsafety public employee to undergo polygraph testing that involved intrusive, wide-ranging questions about the employee's childhood, past drug use, history of petty crimes, and the like. We accepted plaintiff employees' contention that this testing violated the California constitutional right of privacy. Nonetheless, we restated, as "correct," the *Gardner* rule that "a public employee may be required-on pain of dismissal-to answer questions 'specifically, directly, and narrowly relating to the performance of his official duties.' [Citations.]" (*Id.*, at p. 947, 227 Cal.Rptr. 90, 719 P.2d 660.) Thus, we said, "[i]f the City had demanded only that its employees answer questions pertaining directly to performance of their duties upon pain of dismissal, without using the intrusive intermediary of polygraph testing, then this case would be entirely different. [Citation.]" (*Ibid.*)

We are therefore persuaded that neither the federal nor the California constitutional privilege against compelled self-incrimination requires a public employer to provide its employee with a formal grant of criminal use immunity before it can require the employee, upon threat of job discipline, to answer questions relating to the employee's job performance. On the contrary, the employer may discipline, and even dismiss, a public employee for refusing, on grounds of the constitutional privilege, to answer the employer's job-related questions, so long as the employee is not required, as a

condition of remaining in the job, to *surrender* his or her right against criminal use of the statements thus obtained–at least where, as here, the employee is specifically advised that he or she retains that right. (See fn. 5, *ante.*)

As the high court suggested in *Gardner,* the competing public and personal interests are best reconciled by such a rule. In performing their official functions, government officers and employees owe unique duties of loyalty, trust, and candor to their employers, and to the public at large. (*Long Beach, supra,* 41 Cal.3d 937, 952, 227 Cal.Rptr. 90, 719 P.2d 660.) Public agencies must be able promptly to investigate and discipline their employees' betrayals of this trust. In the vast majority of cases, the urgent *administrative* need to root out and eliminate misfeasance or malfeasance by public employees takes priority over any penal implications. (See discussion, *post.*) The Constitution cannot mean that a public employee may refuse with impunity to account for his or her performance on the public payroll, and may delay the progress of an employer's inquiry, unless and until he or she obtains a formal and legally binding guarantee that any statements obtained by the employer will never be used to prosecute the employee on criminal charges.

Indeed, as the instant Court of Appeal conceded, it is not clear how the public employer could even obtain such a formal grant of immunity. No constitutional or statutory provision specifically authorizes any official or public agency to confer such a legally binding guarantee

under these circumstances.[6] The employer's ability to investigate an employee's performance of his or her public responsibility cannot be hamstrung, as a matter of constitutional law, by such concerns.[7]

Despite these considerations, the Court of Appeal cited several grounds for its insistence that formal immunity is required in such cases. For example, the court noted that in *Turley* and *Cunningham,* public employee cases decided after *Gardner* and *Sanitation Men I,* the high court adhered to language suggesting that, unless previously immunized, and aside from any

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6. Plaintiff urges that such authority may be found in Penal Code section 1324, which authorizes a district attorney or other prosecuting agency to request a judicial order granting a witness transactional or use immunity under certain circumstances. But when the section is read in context, it clearly applies only in "felony proceeding [s]" or "proceeding[s] before a grand jury for any felony offense." (*Ibid.*) The statute does not, by its terms, empower the prosecutorial authorities, or a court, to confer advance immunity on a public employee simply because the latter is refusing, on grounds of the privilege against self-incrimination, to answer the employer's job-related questions.

7. The Court of Appeal considered whether courts have, and should exercise, an inherent unilateral power to confer, or declare, an immunity in such cases. However, the court declined to exercise any such power, concluding it would interfere with the ability of prosecutors to decide, on a case-by-case basis, whether criminal investigations would be unduly hindered by conferring immunity on employees who were resisting employer inquiries. (See further discussion, *post.*)

exclusionary rule, one cannot be compelled, over invocation of the Fifth Amendment privilege, to give self-incriminating answers to official questions. (See *Turley, supra,* 414 U.S. 70, 78, 94 S.Ct. 316; *Cunningham, supra,* 431 U.S. 801, 805-806, 97 S.Ct. 2132.)

For several reasons, those decisions do not support the Court of Appeal's position. Like *Garrity, Gardner,* and *Sanitation Men I,* both *Turley* and *Cunningham* involved statutes providing that public employees and public contractors would forfeit those positions unless they *agreed to waive* their Fifth Amendment privileges when called as witnesses before a grand jury. Neither case involved a public employer that sought only to call its own employee to account, while assuring the employee that any statements thereby obtained *could not* be used criminally against the worker. Thus, no issue of *prior* immunity was before the court in either instance. Nonetheless, citing *Gardner,* the court in *Cunningham* reiterated that "[p]ublic employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to *surrender* their constitutional immunity." (*Cunningham, supra,* 431 U.S. 801, 806, 97 S.Ct. 2132, italics added; see *Chavez, supra,* 538 U.S. 760, 768, 123 S.Ct. 1994 (plur opn. of Thomas, J.).)

The Court of Appeal also reasoned that sole reliance on an exclusionary rule to protect a public employee's rights against self-incrimination creates a logical paradox. An exclusionary rule, the court posited, is

intended to prevent the criminal use of *illegally compelled* statements, not to *legalize* what would otherwise be the unconstitutional compulsion of self-incriminatory utterances.

But this premise is exaggerated, if not entirely mistaken. The state and federal self-incrimination clauses say one cannot be made an involuntary witness against himself, or herself, *in a criminal proceeding.* Thus, they do not prohibit officially compelled admissions of wrongdoing as such. They only forbid the *criminal use* of such statements against the declarant. Constitutionally based prophylactic rules, such as a prior-immunity requirement in some cases, have arisen to protect the core privilege, but the right against self-incrimination is not itself violated until statements obtained by compulsion are *used* in criminal proceedings against the person from whom the statements were obtained. (*Chavez, supra,* 538 U.S. 760, 767-773, 123 S.Ct. 1994 (plur. opn. of Thomas, J.); see also *id.,* at p. 777-778, 123 S.Ct. 1994 (conc. opn. of Souter, J.).)

As the high court has made clear, the Constitution affords a public employee no right to refuse to account for his or her job performance, or to avoid dismissal as punishment for such a refusal. It simply forbids use of the compelled statements, or the fruits thereof, in a criminal prosecution against the employee. When a public employer demands job-related information from its employee, while advising that the employee does not thereby surrender the constitutional right against use of the information in a subsequent criminal prosecution,

the employer acts legally. In such circumstances, the employee's constitutional right against self-incrimination is thus directly and precisely satisfied "by precluding any use of his statements at a subsequent criminal proceeding. [Citations.]" (*Lybarger, supra*, 40 Cal.3d 822, 827, 221 Cal.Rptr. 529, 710 P.2d 329.)

Finally, the Court of Appeal expressed special concern about a rule that, in essence, would allow a public employer to confer automatic, unilateral criminal use immunity on its employee by compelling the employee to make self-incriminating statements in the course of an internal disciplinary investigation. The Court of Appeal worried that, by placing immunity control in the employer's hands alone, such an approach might unfairly hinder prosecutors' later attempts to pursue criminal charges against the employee. This is because the prosecution, despite its lack of participation in the decision to grant immunity, would nonetheless shoulder, as its "heavy burden" (*Kastigar, supra*, 406 U.S. 441, 461, 92 S.Ct. 1653), "the affirmative duty to prove [in any such criminal case] that the evidence it propose[d] to use [was] derived from a legitimate source wholly independent of the compelled testimony" (*id.*, at p. 460, 92 S.Ct. 1653).

For several reasons, we are not persuaded. At the outset, we note that whether the *Constitution forbids* the dismissal of a public employee for refusing to answer potentially incriminating questions from an employer that demands no surrender of criminal immunity is distinct from the practical difficulties a prosecutor might

later encounter in pursuing a criminal case. The issue before us-whether plaintiff's termination for refusal to answer his employer's questions was constitutionally permissible-does not directly implicate the latter problem.

We realize that, in some cases, courts have pointed to prosecutorial interests as grounds to refrain from inferring a criminal use immunity that would supplant the constitutional privilege and allow the government to compel incriminating disclosures in noncriminal settings. Thus, in *Conboy, supra,* 459 U.S. 248, 103 S.Ct. 608, and *Doe, supra,* 465 U.S. 605, 104 S.Ct. 1237, the high court concluded that a federal statute gave certain Department of Justice officials the exclusive power to seek criminal use immunity, and was intended thereby to require the government, in each individual case, to balance its prosecutorial needs against other interests before compelling constitutionally protected disclosures. Similarly, in *Marchetti, supra,* 390 U.S. 39, 88 S.Ct. 697, the court indicated that it was for Congress, not the courts, to decide whether the income tax registration laws governing illegal wagering activities served revenue or criminal enforcement purposes. And in *Daly v. Superior Court* (1977) 19 Cal.3d 132, 137 Cal.Rptr. 14, 560 P.2d 1193, we declined to find that courts, without any participation by the People, have the inherent power to immunize, and then compel, potentially incriminating deposition answers demanded in a wrongful death lawsuit between private parties.

On the other hand, in *Byers*, we imposed a prospective rule of criminal use immunity for potentially incriminatory accident-scene disclosures required by California hit-and-run laws, thus allowing punishment of drivers who thereafter failed to provide such disclosures. Balancing the competing interests, we adjudged that "criminal prosecutions of drivers involved in accidents will not be unduly hampered" by such a rule (*Byers, supra*, 71 Cal.2d 1039, 1056, 80 Cal.Rptr. 553, 458 P.2d 465), and that the Legislature, which enacted the disclosure provisions to protect accident victims against financial loss, would prefer that purpose to be upheld despite the incidental effects on criminal enforcement of the traffic laws (*id.*, at p. 1055, 80 Cal.Rptr. 553, 458 P.2d 465).

And in *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 115 Cal.Rptr. 812, 525 P.2d 716, we held that a court, using its powers under the civil discovery statutes, could grant appropriate immunity to allow the State of California, in *its* civil action claiming violations of the unfair competition law, to compel relevant deposition answers. We reasoned that an immunity order in a civil enforcement action by the state itself "would not frustrate but would further the legislative purpose of suppressing deceptive advertising. Nor would it unduly hamper the prosecution of persons who, in the judgment of the authorities, should be subjected to criminal proceedings. [Citations.]" (*Id.*, at pp. 428-429, 115 Cal.Rptr. 812, 525 P.2d 716.)

Similarly here, the competing interests favor the settled rule that, absent a contrary statute, a public employer, acting for noncriminal reasons, may demand answers from its own employee about the employee's job conduct and may discipline the employee's refusal to cooperate, without first involving the prosecuting authorities in a decision about granting formal immunity. The vast majority of such cases are unlikely to have criminal implications; on the other hand, the public employer must be able to act promptly and freely, in its administrative capacity, to investigate and remedy misconduct and breaches of trust by those serving on the public payroll. This strong interest outweighs the incidental effect on enforcement of criminal laws that may arise from the rule that statements thus compelled by the employer cannot be used in aid of a later criminal prosecution against the employee.[8]

Accordingly, we confirm that neither the federal nor the California Constitution allowed plaintiff, free of any sanction, to refuse to answer his employer's questions about his possible job misconduct unless and until he received, in advance, a formal grant of immunity from subsequent criminal use of his statements. Here, as noted, plaintiff's employer did not require him to *waive*

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8. In amicus curiae briefs supporting the county, the Attorney General, the California State Sheriffs' Association and the California Police Chiefs Association, and the Sacramento County District Attorney all agree with this view. In particular, the latter officer notes that methods are available to prevent a public employee's prior compelled incriminating statements from tainting a subsequent criminal prosecution.

his constitutional privilege against such criminal use. On the contrary, plaintiff was accurately advised, on more than one occasion, that any statements he made under compulsion in connection with the employer's internal disciplinary investigation could not be used against him in a criminal case. Under these circumstances, plaintiff's dismissal, insofar as based on disobedience of the employer's order to answer questions, was constitutionally valid. To the extent the Court of Appeal held otherwise, its judgment must be reversed.[9]

DISPOSITION

Insofar as the Court of Appeal held that plaintiff must receive an affirmative offer of formal immunity from criminal use of his statements before he could be dismissed for disobeying his employer's orders to answer questions related to his job performance, its judgment is reversed. In all other respects, the judgment of the Court of Appeal is affirmed.

BAXTER, J.

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9. Because our conclusion is consistent with decades of federal and state authority, no reason appears why it cannot be applied directly to plaintiff's case. (Compare, e.g., *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-355, 84 S.Ct. 1697, 12 L.Ed.2d 894 [application to prior conduct of new and unexpected judicial construction of criminal statute violates due process].)

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
WERDEGAR, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT FILED JANUARY 12, 2007

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

No. H029345

THOMAS SPIELBAUER,

Plaintiff and Appellant,

v.

COUNTY OF SANTA CLARA et al.,

Defendants and Respondents.

January 12, 2007, Filed

JUDGES: Rushing, P. J., with Premo and Elia, JJ., concurring

OPINION BY: Rushing

OPINION

RUSHING, P.J.—Plaintiff Thomas Spielbauer was dismissed by his employer, defendant County of Santa Clara, on the grounds that he had engaged in conduct unbecoming a county employee by making deceptive statements to a judge, and had committed insubordination by refusing to answer questions about

the incident on grounds that his answers might incriminate him. He brought this action in mandate to set aside that decision. The superior court denied relief, and plaintiff brought this appeal. We have concluded that the finding of insubordination cannot be sustained because a public agency cannot penalize one of its employees for refusing to answer incriminating questions unless the state first grants or offers *immunity,* i.e., a binding undertaking not to use his answers in any criminal prosecution. We will therefore reverse the judgment denying relief and direct that the matter be remanded to county authorities to determine the appropriate discipline based upon the one sustainable charge.

Background

On January 27, 2003, plaintiff was counsel of record for one Michael Dignan, who was charged with possessing ammunition while a convicted felon. On that date plaintiff appeared before Judge Teilh, to whom the case had been assigned for trial, to argue certain motions in limine. Among these was a motion by the prosecutor to exclude extrajudicial statements by one Troy Boyd, who had been detained at the same time as Dignan, but not charged. Plaintiff confirmed that he intended to offer into evidence Boyd's hearsay statement to police "that his parents owned the house" where the ammunition was found "and that he has been renting it since he was 19 years of age."

The apparent purpose of this evidence was to support a doubt in the jury's mind that Dignan had been in control of the area where the contraband ammunition was found. This strategy depended on the ambiguity and incompleteness of Boyd's reported statements. As he later said, he was renting the house from his parents but in turn subletting portions of it to others, including Dignan. The value of Boyd's statements, as viewed by the defense, thus lay in their failure to mention Dignan's own possessory interest, a fact that would presumably emerge if Boyd testified.

The prosecutor argued that Boyd's statements were inadmissible hearsay. He asserted that they could not come within any hearsay exception predicated on the unavailability of the declarant (i.e., Boyd) to testify, since there had been no evidence of any attempt by the defense to secure Boyd's attendance at trial. When Judge Teilh asked plaintiff what exception to the hearsay rule would permit the statements to come into evidence, plaintiff asserted that he had not sent an investigator to look for Boyd, in part because "Mr. Boyd has a warrant out for his arrest. And if the San Jose Police are not going to be able to find Mr. Boyd, I think that my investigator is going to be very hard put to find an individual who is avoiding contact with anybody that has to do with the judicial system." He presented an outstanding $5,000 warrant for Boyd, and contended that insofar as Boyd's unavailability as a witness was required to establish a hearsay exception, "the fact that there is a warrant out for Troy Boyd would meet that burden."

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The prosecutor argued that plaintiff's "non-existen[t]" efforts to locate Boyd did not establish the "due diligence" necessary to establish a declarant's unavailability for hearsay purposes. Plaintiff replied that to exclude the statements would deprive Dignan of "a critical defense," i.e., doubts based on Boyd's possessory interest in the house, and that this would be unfair because Boyd was "a foggy, gray kind of witness who doesn't like to be–who's had problems with the law and avoids contact with any kind of authority figures. . . ." After further argument, the court ruled that it would "allow those statements to come in as to the ownership of the house and his residence there."

Plaintiff then said he wanted the jury to be told that Troy Boyd had an outstanding arrest warrant or was a fugitive from justice. Otherwise, he argued, jurors might wonder, "Why didn't Mr. Dignan call Mr. Boyd?" The prosecutor replied that this was a "very good question" because "Mr. Spielbauer has acknowledged to this court that he's made zero effort to locate him." Plaintiff replied, "Well, I'd like to tell the jury why I have not. I'd like to tell the jury why, because he's got a warrant for his arrest and he's ducking [i.e., avoiding service of process]." He then expressed an intention to move the arrest warrant into evidence in order to "explain to the jury why Mr. Boyd is not here as a witness for Mr. Dignan."

Plaintiff did not inform the court that on the day before this hearing, he had spoken to the witness Boyd at the house in question. This fact emerged three days

later, after a police sergeant went to the house and found Boyd there. Boyd told him that he had spoken to "a public defender investigator. . . ." When the prosecutor confronted plaintiff with this information, plaintiff said it had been he, not an investigator, who spoke with Boyd. Plaintiff then told the court that he had gone to the house to take photographs on Sunday, January 26, 2003; that he there found "a whole bunch of people watching the Super Bowl"; and that one of them "turned out to be Mr. Boyd." Plaintiff had not carried a subpoena, he said, because he had not expected to find Boyd there. He recounted a conversation in which Boyd "told me that he would not cooperate in being served. He told me he did not want to inject himself into the legal system. He did not want to come to court. He did not want to testify." Plaintiff asserted that he had no obligation to tell the court on Monday that he had "bumped into" the witness on the day before. He offered the rationale that such a disclosure "calls into question basically what you would call the attorney work product."

The prosecutor contended that plaintiff's statements on January 27, 2003, constituted an "affirmative false misrepresentation [*sic*] . . . to this Court," and that plaintiff had "injected himself as a witness into this case by attempting to frustrate the discovery of the truth." Without addressing this assertion, the court ruled that Boyd was in fact available

as a witness and that this would be taken into account in ruling on any hearsay objection.[1]

In late February or early March, Chief Assistant Public Defender David Mann heard about the foregoing incident, and was told that the deputy district attorney in the Dignan matter "was getting transcripts from [that] case and was going to 'go after' [plaintiff] in some fashion." Mann communicated with the office of the District Attorney, which in mid-March supplied a "packet of material" concerning plaintiff's statements to Judge Teilh. Officials there told him the office had not decided which of three options to pursue: "file a misdemeanor charge against [plaintiff] . . . ; report him to the State Bar; or leave it to us to handle." Mann decided not to wait for a decision by that office but to go ahead with an internal investigation. Later–around the end of May 2003–the office of the district attorney did file a misdemeanor complaint charging plaintiff with a deceit upon the court in violation of Business and Professions Code section 6128. Although the present record is incomplete on this point, plaintiff asserts that the action was ultimately dismissed by stipulation.

Meanwhile the public defender's office undertook its own investigation. The office first scheduled an

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1. Some months later, Judge Teilh expressed regret that these events had produced disciplinary action against plaintiff, stating that he did not believe any misconduct had occurred. Plaintiff has made much of this opinion at times, even suggesting that it precluded a finding of misconduct. He predicates no legal argument on it before us.

interview between plaintiff and Joe Guzman, supervisor of the felony division, on March 26, 2003. That meeting was apparently not transcribed, but was continued to April 1, 2003, after plaintiff demanded, through counsel, an opportunity to review relevant documents plus citation of the authority on which the meeting was convened.

By the time of the continued meeting on April 1, 2003, if not before, a dispute had arisen over plaintiff's obligation to answer questions concerning the events in question. On that date a department investigator, Alayne Bolster, asked plaintiff to describe his meeting with the witness Troy Boyd. Plaintiff's attorney, Zacharias Ledet, interjected that plaintiff "declines to answer your question, relying on the advice of counsel and protection afforded to him under the Constitution of the State of California, the Constitution of the United States, and the Statutes and Laws of the State of California, the County of Santa Clara, and the United States of America." Guzman responded by addressing plaintiff: "Tom, you have a right to remain silent and not incriminate yourself. Your silence, however, may be deemed insubordination, leading to administrative discipline up to and including termination. Any statement made during this interview cannot, and I emphasize cannot, be used against you in any subsequent criminal proceeding. Do you understand what I've just read to you?" In the ensuing exchange, plaintiff's counsel stated that the protection against penal use as described by Guzman "only applies to peace officers" and that the "advisement" read to plaintiff was

thus "not on point and unless you receive a ruling from a Court of Law, that advisement could not cover Mr. Spielbauer. . . ." Guzman then said, "I want to make clear that this is not a criminal proceeding. . . . This is an employee investigation, okay. What we do here stays within the Public Defender's Office. This is not going to be sent over to the DA's Office, okay. What I'm saying is, . . . anything you say at this meeting cannot be used against you in a criminal proceeding. So you are directed to answer the questions and your refusal to answer the questions will be deemed as insubordination." Guzman later stated that he was giving plaintiff "a direct order to answer all questions truthfully, candidly, and to the best of your ability." Later he reiterated these points: "I'm giving you a direct order to answer the questions. I'm also informing you that your refusal to answer all questions germane to this investigation will be regarded as insubordination which is a disciplinary offense that can lead to discipline up to and including termination. . . . [A]s it relates to your right to remain silent, and not incriminate yourself, you have a right not to answer the questions. That refusal may be deemed insubordination leading to administrative discipline. . . . Any statement made during this investigation cannot be used against you in any subsequent criminal proceeding." Plaintiff continued to object through Ledet.

Matters proceeded in much the same way at the continued meeting of April 10, 2003, except that Guzman no longer told plaintiff he had a right to remain silent, stating instead, "This is an employee-employer

investigation so therefore you do not have a right to refuse to answer these questions. Should you refuse, you may be guilty or you will be guilty of insubordination, an offense that can and will lead to discipline up to and including termination. And any information that Tom provides in this particular interview cannot and will not be used against him in a criminal case. This is strictly internal, employee-employer related issues." Ledet stated that the office had provided "no authority for the[se] assurances" and that cases cited for them in correspondence were concerned only with peace officers. At the conclusion of the meeting he asserted that Guzman had exhausted his right to conduct such meetings under governing personnel policies and procedures and that "going any further would be unreasonable," adding that plaintiff would continue to invoke his rights not to answer.

On June 9, 2003, Mann recommended that plaintiff's employment be terminated on three grounds: (1) violation of a merit system rule authorizing discipline for "[r]efusal to accept a reasonable and proper assignment from an authorized supervisor; insubordination" (Santa Clara County Code (County Code), § A25-301, subd. (a)(5)); (2) violation of a merit system rule authorizing discipline for "gross misconduct, or conduct unbecoming a County officer or employee which tends to discredit the County or County service" (County Code, § A25-301, subd. (b)(1)); and (3) violation of a public defender's office ethical rule prohibiting any "member of the professional staff" from "seek[ing] to mislead or deceive a judge, jury, or party by an artifice or false statement of fact or law. . . ."

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Plaintiff requested an administrative appeal, and a *Skelly* hearing was conducted by Assistant County Counsel Susan G. Levenberg. (See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, 124 Cal.Rptr. 14, 539 P.2d 774 (*Skelly*).) She sustained the recommended disciplinary action. Plaintiff appealed this ruling in turn to the County Personnel Board, which upheld the action, finding that plaintiff made false and misleading statements to Judge Teilh; that he did so in a deliberate attempt to mislead the court; that this violated the public defender's written policies and constituted unbecoming conduct and thus cause for dismissal under county merit system rules; and that plaintiff's refusal to answer questions during the three investigational meetings constituted a refusal to accept a reasonable and proper assignment, i.e., insubordination under merit system rules.

Plaintiff then commenced this action for a writ of mandate or administrative mandate. In a lengthy written decision, the trial court ruled that plaintiff had received a fair hearing, that the decision to terminate his employment was not an abuse of discretion, and that it was supported by substantial evidence. The court rejected plaintiff's argument that he had to receive a grant of immunity before he could be punished for refusing to answer potentially incriminating questions. The court entered judgment for defendant, and denied plaintiff's motion for new trial. Plaintiff filed this timely appeal.

Appendix B

Discussion

I. *Standard of Review*

Plaintiff contends that in reviewing the trial court's denial of his writ petition, this court must apply its independent judgment. Defendant disagrees, stating that while the trial court was obliged to apply its independent judgment–and did so–this court's assessment must be guided by the substantial evidence test.

Plaintiff is of course correct in stating that this court must exercise its independent judgment in reviewing the trial court's determinations on questions of law. (*Anserv Insurance Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204, 99 Cal.Rptr.2d 357.) But he is mistaken in suggesting that this court exercises its independent judgment on questions of fact. He cites *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 112 Cal.Rptr. 805, 520 P.2d 29, for the proposition that review of a "vested property right" is a "question[ ] of *de novo* review by this Court. . . ." That case does not contain the stated proposition. The court there was not concerned with the standard of *appellate* review at all; the sole question was the standard to be applied in the trial court. (See *id.* at p. 32, 112 Cal.Rptr. 805, 520 P.2d 29.)

Although plaintiff sought relief in both traditional mandate (Code Civ. Proc., § 1086) and administrative mandamus (Code Civ. Proc., § 1094.5 (section 1094.5)),

he does not dispute the trial court's determination that the case sounds in administrative mandamus. Section 1094.5 governs any "inquiry into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer" (Code Civ. Proc., § 1094.5, subd. (a)), sets out two alternative standards of review for factual findings: "[I]n cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).)

It is undisputed that the termination of plaintiff's employment was subject to review under the weight of the evidence standard because it substantially affects a fundamental right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, 93 Cal.Rptr. 234, 481 P.2d 242; see *Valenzuela v. Board of Civil Service Comrs.* (1974) 40 Cal.App.3d 557, 565, 115 Cal.Rptr. 103 [termination of permanent classified civil service employment with city affected fundamental right so as to be subject to independent judgment review]; *Skelly, supra,* 15 Cal.3d at p. 206, 124 Cal.Rptr. 14, 539 P.2d 774 [permanent employee in state civil service has "a property interest in continuation of his employment which is protected by due process"].)

However, that standard governs only the *trial court's* assessment of the evidence; a reviewing court must apply the substantial evidence test, sustaining every finding of fact that is supported by substantial evidence, whether or not the evidence might also have supported a contrary finding. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, 85 Cal.Rptr.2d 696, 977 P.2d 693.)

We will therefore review questions of law independently, while deferring to the trial court's findings on questions of fact.

II. *Insubordination*

A. *Introduction*

The Board found that plaintiff was guilty of insubordination because, relying on his privilege against self-incrimination, he refused to answer questions by his supervisor, Guzman, about the incident at issue. Plaintiff contends that this finding is insupportable as a matter of law because he could not lawfully be required to answer questions about the incident at issue, or disciplined for refusing to do so, without first being granted immunity against criminal prosecution. This contention has merit. As will appear, the United States Supreme Court has declared that the prohibition against officially compelled self-incrimination extends to a state's attempts to compel a public employee, through threats of discipline, to answer potentially incriminating questions. A public employee can be disciplined for refusing to answer such questions only if he was first

granted immunity against the use of his statements, or any evidence derived from them, in any criminal case against him. Some California cases have abrogated this rule–inadvertently, as it appears–by conflating it with a separate and distinct remedial rule excluding from any criminal trial statements the defendant was compelled to make in violation of his privilege against self-incrimination, and evidence derived from such statements. The combining of these two distinct rules by judicial fiat is not only contrary to paramount federal authority, but logically insupportable; moreover, it imperils other official interests which more circumspect California decisions have taken great pains to accommodate. Foremost among these is the enforcement of the criminal laws, which may be impeded and even stymied by the defendant's having been compelled before trial to make incriminating disclosures. For these reasons, as elaborated below, we will hold that in the absence of a formal grant of immunity, which defendant apparently had no power to make, plaintiff could not be guilty of insubordination for failing to answer incriminating questions.

B. *Privilege Against Compelled Self-Incrimination in Public Employment*

The Fifth Amendment declares that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." (U.S. Const., amend. 5; see Cal. Const., art. I, § 15 ["Persons may not . . . be compelled in a criminal cause to be a witness against themselves. . . ."].) This right "not only protects the

individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." (*Lefkowitz v. Turley* (1973) 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (*Turley*); see *Kastigar v. United States* (1972) 406 U.S. 441, 444-445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (*Kastigar*), fns. omitted ["The privilege . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used"].)

Here it is not disputed that at least some of the questions directed to plaintiff by his superiors had the potential to support a criminal prosecution against him. Indeed, such a prosecution was under active consideration throughout the time the public defender's office was investigating the incident and attempting to compel answers from plaintiff. The question then is whether plaintiff could be compelled to answer, or disciplined for refusing to do so, despite the incriminating potential of his answers.

The basic rule is that "a witness protected by the privilege may *rightfully refuse to answer unless and until he is protected* at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant."

(*Turley, supra,* 414 U.S. at p. 78, 94 S.Ct. 316, italics added, citing *Kastigar, supra,* 406 U.S. 441, 92 S.Ct. 1653.)[2] The state cannot lawfully penalize him for such refusal without first affording him such protection. (*Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 805, 97 S.Ct. 2132, 53 L.Ed.2d 1 (*Cunningham*) ["[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself"].)

This prohibition extends to demands for information by the state in its role as employer. Thus a state agency cannot compel its employees to answer incriminating questions over a Fifth Amendment objection unless it first grants them protection against the use of their compelled answers, and evidence derived from those

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2. The scope of the required protection was in some doubt until the Supreme Court ruled in *Kastigar, supra,* 406 U.S. at p. 453, 92 S.Ct. 1653, that the government could overcome the Fifth Amendment privilege by an undertaking to refrain from the direct use of the compelled disclosures (i.e., their admission into evidence), as well as derivative use (i.e., as means to the discovery or production of other incriminating evidence), in any criminal prosecution. Prior to that decision it had been widely supposed that defeasance of the privilege required a grant of *transactional* immunity, which exempts the interrogatee from prosecution with respect to matters disclosed under immunity. (*Id.* at pp. 449-453, 92 S.Ct. 1653; see *Counselman v. Hitchcock* (1892) 142 U.S. 547, 585-586, 12 S.Ct. 195, 35 L.Ed. 1110.) The widespread belief that transactional immunity was necessary spawned many statutes providing such immunity, including some two dozen still on the books in California.

answers, in any later criminal prosecution. (*Turley, supra,* 414 U.S. 70, 94 S.Ct. 316 [contractor with state could not be penalized by loss of state business for refusing to waive Fifth Amendment privilege in grand jury proceeding]; *Gardner v. Broderick* (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 [police officer could not be discharged for refusing to waive privilege and testify before grand jury without protection against subsequent prosecution]; *Sanitation Men v. Sanitation Comm'r* (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (*Sanitation Men*) [city could not discharge workers for refusing to answer questions or for refusing to waive privilege].)

The ultimate aim of the amendment, however, is only to protect individuals against the use of their compelled disclosures to convict them of crime. It does not protect from other adverse effects of disclosure. Thus an interrogatee can be compelled to answer, and punished for refusing to do so, if he is granted adequate protection against the penal use of his statements. (*Turley, supra,* 414 U.S. at p. 84, 94 S.Ct. 316 ["Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use."]; see *Chavez v. Martinez* (2003) 538 U.S. 760, 768, 123 S.Ct. 1994, 155 L.Ed.2d 984["[W]e have long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used against

the speaker in any criminal case"]; *Ullmann v. United States* (1956) 350 U.S. 422, 431, 76 S.Ct. 497, 100 L.Ed. 511, quoting *Hale v. Henkel* (1906) 201 U.S. 43, 67, 26 S.Ct. 370, 50 L.Ed. 652 [" '[I]f the criminality has already been taken away, the Amendment ceases to apply' "].)[3] Moreover, once he is lawfully compelled to answer, his disclosures may furnish grounds for imposing adverse consequences, provided they are not penal in nature. (See *Blackburn v. Superior Court, supra,* 21 Cal.App.4th at p. 426, 27 Cal.Rptr.2d 204 ["Whereas the Fifth Amendment privilege may be invoked by a civil litigant [citation], it does not provide for protection against civil penalties"]; *Segretti v. State Bar* (1976) 15 Cal.3d 878, 886-887, 126 Cal.Rptr. 793, 544 P.2d 929 [immunized testimony was properly considered in disciplinary proceedings against attorney].) Thus if a public employee is protected from self-incrimination in

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3. He can also be compelled to answer if some other rule of law precludes conviction: " 'If, at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense, or, if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim any privilege under the provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness "against himself." ' " (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 428, 27 Cal.Rptr.2d 204, italics removed, quoting *Ex Parte Cohen* (1894) 104 Cal. 524, 528, 38 P. 364.)

the manner contemplated by these cases, his compelled answers may form the basis for discipline, as may his continuing refusal to answer.

In sum, the state cannot compel any person, including one of its employees, to furnish information that may contribute to the imposition of criminal penalties on that person. If the threat of criminal penalties has been removed, however, the state *can* require the person to answer, and if the answers furnish grounds for other adverse actions, the erstwhile risk of incrimination poses no impediment to those actions.

C. *Immunity and the Exclusionary Rule*

The foregoing cases stand for the rule that the state cannot compel a public employee to answer incriminating questions "unless and until he is protected" against the use of his answers to make a criminal case against him. (*Turley, supra,* 414 U.S. at p. 78, 94 S.Ct. 316.) In the absence of such protection, the interrogatee is "privilege[d]" to stand mute without fear of punishment for his refusal to answer.[4] (*Id.* at p. 77, 94 S.Ct. 316; see

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4. Exercise of the privilege can also, in a non-criminal setting, furnish the basis for evidentiary inferences adverse to the interrogatee. (See *Baxter v. Palmigiano* (1976) 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810, quoting 8 Wigmore, Evidence (McNaughton rev.1961) § 2272, p. 439.) Presumably, a public employee's silence, with or without immunity, could support inferences adverse to him with respect to matters under inquiry. Defendant here did not purport to rely on plaintiff's silence only for such evidentiary purposes. Rather it treated his refusal to answer as a distinct disciplinary offense.

Cunningham, supra, 431 U.S. at p. 805, 97 S.Ct. 2132.) The protection contemplated by these cases is a grant of *immunity,* i.e., an *undertaking by the state not to use* the answers to prosecute. (*Cunningham, supra,* at p. 806, 97 S.Ct. 2132 ["[G]overnment cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"]; *Turley, supra,* at p. 85, 94 S.Ct. 316, italics added ["if answers are to be required in such circumstances [i.e., on pain of discharge] *States must offer to the witness whatever immunity is required to supplant the privilege* and may not insist that the employee or contractor waive such immunity"]; *Chavez v. Martinez, supra,* 538 U.S. at pp. 770-771, 123 S.Ct. 1994, italics added [among the "prophylactic rules" adopted under the Fifth Amendment is "an evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been *immunized . . . before it is compelled*"]; *id.* at p. 771, 123 S.Ct. 1994, italics added [interrogatee is entitled "to *insist on an immunity agreement before* being compelled to give incriminating testimony in a noncriminal case"]; *Stevens v. Marks* (1966) 383 U.S. 234, 246, 86 S.Ct. 788, 15 L.Ed.2d 724, fn. omitted ["A witness has . . . a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him."]; see *Baxter v. Palmigiano, supra,* 425 U.S. 308, 318, 96 S.Ct. 1551, italics added [drawing adverse inference from inmate's silence in

prison disciplinary proceeding "does not smack of an invalid attempt by the State to *compel testimony without granting immunity* or to penalize the exercise of the privilege"].)

This privilege to stand mute must be distinguished from a second rule of federal constitutional law, which arises *after* an individual has been unlawfully compelled to answer incriminating questions. Under this rule, when a compulsion to answer violates the interrogatee's right to remain silent, he may object to the admission of his answers, or any evidence derived from them, in any criminal action brought against him. Thus if a public employee is compelled to answer incriminating questions under a threat of dismissal, his responses will be excluded from a subsequent criminal prosecution. (*Garrity v. New Jersey* (1967) 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (*Garrity*); *Turley, supra,* 414 U.S. at pp. 78, 80, 94 S.Ct. 316.) This exclusionary rule is a *remedial* device predicated upon an *unlawful violation* of the interrogational privilege.

The governing federal cases clearly reflect the distinction between immunity required for a state to lawfully compel answers, and the right to exclude answers that are unlawfully compelled. (*Turley, supra,* at p. 78, 94 S.Ct. 316, italics added, citations omitted ["[A] witness protected by the privilege may *rightfully refuse to answer* unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, *if*

he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution"]; *Garner v. United States* (1976) 424 U.S. 648, 653, 96 S.Ct. 1178, 47 L.Ed.2d 370, italics added ["the [Fifth Amendment] privilege protects against the use of compelled statements *as well as* guarantees the *right to remain silent absent immunity*"].) The Supreme Court has acknowledged that the two principles are in some respects "coextensive." (*Chavez v. Martinez, supra,* 538 U.S. at pp. 769-770, 123 S.Ct. 1994.) However, it has steadfastly refused to fuse them into a single rule.

In *Maness v. Meyers* (1975) 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574, an attorney was held in contempt for advising his client, the defendant in a civil obscenity trial, not to comply, on self-incrimination grounds, with the city attorney's subpoena demanding production of certain magazines. In addition to assurances that he had no intention of prosecuting, the city attorney argued that the defendant was "amply protected" against self-incrimination "because in any ensuing criminal action he could always move to suppress, or object on Fifth Amendment grounds to the introduction of the magazines into evidence." (*Id.* at pp. 461-462, 95 S.Ct. 584, fn. omitted.) The Supreme Court rejected this view: "Laying to one side possible waiver problems that might arise if the witness followed that course, [citation], we nevertheless cannot conclude that it would afford adequate protection. Without something more 'he would be compelled to surrender the very protection which the privilege is designed to guarantee.' [Citation.]"

(*Id.* at p. 462, 95 S.Ct. 584, fn. omitted.) In a footnote, the court explained what it meant by "something more": "It is important here that the witness was not granted immunity from prosecution on the basis of any magazines he might produce. . . . [¶] Had the witness been *granted formal immunity* a different case would be presented; *in that event* a witness may be compelled to testify." (*Id.* at p. 462, fn. 10, 95 S.Ct. 584, italics added, citing *Kastigar, supra*, 406 U.S. 441, 92 S.Ct. 1653.)

Eighteen years later the court again rejected a contention that the anticipated exclusion of statements at a future criminal trial justifies their compulsion in a non-criminal setting. In *Pillsbury Co. v. Conboy* (1983) 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430, a deponent in a civil case was held in contempt for refusing to answer questions that closely tracked questions he had already answered under a grant of federal statutory immunity. In addition to noting that federal courts lack the power to confer immunity other than as authorized by statute, the court rejected the idea that a trial court could or should base such a ruling on forecasting the determination to be made in a later criminal trial. (*Id.* at p. 261, 103 S.Ct. 608.) In holding the deponent in contempt, the trial court had "essentially predicted that a court in a[ ] future criminal prosecution . . . w[ould] be obligated to protect against evidentiary use of the deposition testimony petitioners seek. We do not think such a predictive judgment is enough." (*Ibid.*) Arguments to the contrary "impose[d] risks on the deponent whether or not the deposition testimony properly can be used against him in a subsequent

criminal prosecution." (*Id.* at p. 262, 103 S.Ct. 608, fn. omitted.) The trial court's order of compulsion could not be "justified by the subsequent exclusion of the compelled testimony." (*Ibid.*)

The court again rejected such an argument in *United States v. Doe* (1984) 465 U.S. 605, 609-610, 104 S.Ct. 1237, 79 L.Ed.2d 552, where the government asserted that a subpoena should be enforced over a Fifth Amendment objection, despite a lack of formal immunity, "because of the Government's offer not to use respondent's act of production against respondent in any way." The court refused to adopt "a doctrine of constructive use immunity," under which "the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures have not been followed." (*Id.* at p. 616, 104 S.Ct. 1237.) The court "decline[d] to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the [governing] statute requires." (*Ibid.*, fn. omitted; see *Matter of Special Federal Grand Jury Empanelled Oct. 31, 1985* (3d Cir.1987) 819 F.2d 56, 59 [rejecting argument that immunity was unnecessary to overcome a Fifth Amendment objection because incriminating disclosures "would not be admissible because they could be suppressed"; argument was "but a recasting of the constructive use immunity contention rejected in *Doe*"].)

Appendix B

In sum, federal cases contemplate two distinct shields, which become available at different stages of a prospective or actual prosecution. The first arises in any official *interrogation,* and entitles the interrogatee to *refuse to answer incriminating questions unless immunity is granted.* The second arises at the time of a criminal *trial,* and entitles the defendant to *exclude from evidence* any incriminating statement, or evidence derived from a statement, that was extracted in violation of the first privilege. The interrogational privilege *preserves* the right to remain silent; the exclusionary rule *remedies a breach* of that right. These rights coexist because any attempt to compel incriminating disclosures places the interrogatee " 'between the rock and the whirlpool.' " (*Stevens v. Marks, supra,* 383 U.S. at p. 243, 86 S.Ct. 788.) He is entitled to resist threats of punishment for his exercise of the right to remain silent, but he may be excused if instead he succumbs. (*Ibid.; Garrity, supra,* 385 U.S. at p. 498, 87 S.Ct. 616.) In either case the law strives to vindicate his right to remain silent-in the first situation by setting aside any adverse consequences visited upon him for standing mute, and in the second by excluding from evidence his wrongfully compelled statements, and any evidence derived from them. The first right is preservative and protective; the second, restorative and remedial.

Here, when plaintiff's supervisor sought to question him in a potentially incriminating manner, plaintiff asserted his right to remain silent, and the supervisor told him he must answer or subject himself to discipline,

including discharge, for insubordination. Although the supervisor stated that plaintiff's answers could not be admitted in a criminal prosecution–an apparent allusion to the rule of exclusion–he never granted or offered *immunity.* Under the foregoing authorities, the failure to offer immunity was fatal to any attempt to discipline plaintiff for remaining silent. It follows that the Board's finding of insubordination cannot survive.

D. *Conflation of Federal Protections in California Cases*

The relatively straightforward analysis set forth above conflicts with several California decisions that have failed to note the dual nature of the federal protection and the need for an offer or grant of immunity as a predicate for lawfully compelled answers. Defendant contends that these cases permitted it to compel answers from plaintiff without such a grant, so long as it told him that his answers could not be used to incriminate him. Defendant cites *Kelly v. State Personnel Board* (1979) 94 Cal.App.3d 905, 911, 156 Cal.Rptr. 795 (*Kelly*), where a criminalist challenged his dismissal from state service for failing to comply with his employer's request for information concerning his alleged mishandling of controlled substances.[5] He

5. Defendant also quotes *Hingsbergen v. State Personnel Board* (1966) 240 Cal.App.2d 914, 921-922, 50 Cal.Rptr. 59, where the court wrote, " 'A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and (Cont'd)

contended that the dismissal violated his rights to free association and privacy. (*Kelly, supra,* 94 Cal.App.3d at p. 911, 156 Cal.Rptr. 795.) After acknowledging that it was "not concerned with plaintiff's right against self-incrimination," the court went on to state, "[A] public employee may be required to answer questions relative to his fitness for his employment if his answers cannot be used against him in a subsequent criminal proceeding. (See *Lefkowitz v. Turley* (1973) 414 U.S. 70, 77[, 94 S.Ct. 316, 38 L.Ed.2d 274], . . .) If the employee still refuses to answer questions relevant to his official duties then he may be dismissed. (*Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 918, 145 Cal.Rptr. 396.)" (*Ibid.*) But *Turley* does not say that an employee may be compelled to answer whenever his answers cannot be used against him. It says he can be compelled to answer when *granted immunity* coextensive with the privilege.

A similar misapprehension appears in *Szmaciarz v. State Personnel Bd., supra,* 79 Cal.App.3d 904, 918, 145 Cal.Rptr. 396 (*Szmaciarz*), on which *Kelly* relied. That case upheld the dismissal of a prison guard based in part on admissions he made under interrogation after being

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(Cont'd)

losing his employment.' " (See *id.* at p. 921, 50 Cal.Rptr. 59 [personnel board correctly stated that " 'whatever appellant's rights may be as a private citizen, he must, as a state employee, obey orders to cooperate in an investigation of a state agency or be subject to disciplinary action' "].) That case was decided before most of the federal authorities on which we have relied, and the quoted statements are flatly incompatible with them.

"advised he would be required to answer the questions and take a polygraph test or he would automatically be dismissed." (*Szmaciarz, supra,* 79 Cal.App.3d at p. 909, 145 Cal.Rptr. 396.) At an ensuing hearing the guard attempted to assert a Fifth Amendment privilege, but answered questions " 'under protest' " after being allowed 10 minutes to reconsider. (*Id.* at p. 910, 145 Cal.Rptr. 396.) Without acknowledging the rule set out five years earlier in *Turley,* the court declared that "the Department was justified" in "advising" the guard that "if he refused to answer the questions or to submit to a polygraph, he would be dismissed" (*id.* at p. 916, 145 Cal.Rptr. 396), and that he was properly compelled to testify at the hearing because "if a peace officer refuses to answer questions posed regarding his official duties, he may be dismissed." (*Id.* at p. 918, 145 Cal.Rptr. 396.)

The court extracted this supposed rule from *Garner v. United States, supra,* 424 U.S. 648, 96 S.Ct. 1178, where the court held that the Fifth Amendment was not violated by required disclosures on tax returns where the taxpayer complied with the requirement rather than asserting the privilege. In the passage quoted in *Szmaciarz, supra,* 79 Cal.App.3d at page 918, 145 Cal.Rptr. 396, the high court wrote: "Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself." (*Garner v. United States, supra,* 424 U.S. at p. 655, 96 S.Ct. 1178.) The court in *Szmaciarz* evidently read this

to mean that there is *no right to remain silent* in a "noncriminal investigation." But that is obviously not its purport, since such a rule would contradict the very well settled rule, noted above, that the privilege may be asserted in any proceeding where incriminating answers are sought to be compelled. The actual gist of the quoted passage was that in noncriminal matters, an individual must ordinarily *assert* a "claim of privilege," i.e., must invoke the right to remain silent, in order to stand on it. This is not true in a criminal case, where the defendant has an "absolute right not to be called as a witness and not to testify." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137, 151 Cal.Rptr. 653, 588 P.2d 793.) In any other context, a witness may fairly be compelled to answer questions unless and until an issue of self-incrimination is openly raised. A witness in a "noncriminal" setting must do something to invoke the privilege in order to put in issue his presumptive obligation to answer. This, and not an implied overruling of the massive body of case law we have cited, is the intent of the passage quoted in *Szmaciarz.*

The court also attempted to distinguish *Gardner v. Broderick, supra,* 392 U.S. 273, 88 S.Ct. 1913, on the ground that the police officer there was not only ordered to answer but also to "waive the immunity to which he was entitled. . . ." (*Szmaciarz, supra,* 79 Cal.App.3d at p. 918, fn. 6, 145 Cal.Rptr. 396.) The court read *Gardner* to hold that the officer "could not be dismissed for failing to waive immunity although he could be dismissed for refusing to answer questions relating to the performance of his official duties." (*Ibid.*) If *Gardner* stood alone as

the last word on the subject, it might be susceptible to such a narrow reading. (But see *Gardner, supra,* at p. 276, 88 S.Ct. 1913, italics added ["Answers may be compelled regardless of the privilege *if there is immunity* from federal and state use of the compelled testimony or its fruits"].)

However *Gardner* neither stood alone nor provided the last word, and the narrow reading it receives in *Szmaciarz* is incompatible with two decisions not cited there. It was decided simultaneously with *Sanitation Men, supra,* 392 U.S. 280, 88 S.Ct. 1917, where 15 workers complained of being discharged in violation of their Fifth Amendment rights. Three had refused to sign waivers of immunity, and so might come within the narrow rule posited in *Szmaciarz.* But 12 of the workers had been discharged before they were asked to sign anything, solely for refusing to testify before a commissioner. (*Id.* at pp. 281-282, 88 S.Ct. 1917.) The Supreme Court made no distinction between these two groups; the rights of all 15 had been violated. Also overlooked in *Szmaciarz* was *Turley, supra,* 414 U.S. 70, 94 S.Ct. 316, where the court repeatedly referred to "immunity" as a prerequisite to *any* compelled disclosure of potentially incriminating information. (See *id.* at p. 79, 94 S.Ct. 316 [where testimony is sought from third party witness in criminal case, "the price for incriminating answers . . . is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination"]; *id.* at p. 81, 94 S.Ct. 316["Immunity is required if there is to be 'rational accommodation between the imperatives of the privilege

and the legitimate demands of government to compel citizens to testify' "]; *id.* at p. 82, 94 S.Ct. 316 [state "intended to accomplish what Garrity specifically prohibited-to compel testimony that had not been immunized"].)

In *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 221 Cal.Rptr. 529, 710 P.2d 329 (*Lybarger*), our own Supreme Court failed to note the critical role of immunity as a prerequisite to compelled disclosures. There a police officer refused to answer questions put to him during an internal departmental investigation into alleged misconduct. His interrogators told him "that a criminal investigation was pending, and that if [he] refused to cooperate in this administrative interview, he could be charged with insubordination and could lose his job." (*Id.* at p. 825, 221 Cal.Rptr. 529, 710 P.2d 329.) After conferring with counsel he refused to cooperate. (*Id.* at p. 825, 221 Cal.Rptr. 529, 710 P.2d 329.) He was ultimately discharged for insubordination. (*Id.* at p. 826, 221 Cal.Rptr. 529, 710 P.2d 329.) He contended that this violated his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov.Code, § 3300 et seq.), and specifically Government Code section 3304, subdivision (a), which prohibits punitive action against a public safety officer for exercising his rights under the act. He contended that his refusal to answer questions was an exercise of rights protected by the act.

The court reversed, but not on the ground urged by the officer. Instead it held that his interrogators had not complied with the statutory requirement that a

public safety officer be "informed of his constitutional rights" once it is "deemed" that he may be charged with a criminal offense. (Former Gov.Code, § 3303, subd. (g); see now Gov.Code, 3303, subd. (h).) The noncompliance consisted of their failure to tell him that "any statement made under the compulsion of the threat of ... discipline could not be used against him in any subsequent criminal proceeding." (*Lybarger, supra,* 40 Cal.3d at p. 829, 221 Cal.Rptr. 529, 710 P.2d 329.) The decision to dismiss him had to be annulled because, had he been informed of that right, he might have elected to cooperate rather than refusing to answer questions. (*Id.* at pp. 825, 830, 221 Cal.Rptr. 529, 710 P.2d 329.)

The decision's primary pertinence here is its statement that the officer had no constitutional right to remain silent because "his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding. (See *Lefkowitz v. Turley* (1973) 414 U.S. 70 [, 94 S.Ct. 316, 38 L.Ed.2d 274], . . . ; *Garrity v. State of New Jersey* (1967) 385 U.S. 493, 500[, 87 S.Ct. 616, 17 L.Ed.2d 562], . . .)" (*Lybarger, supra,* 40 Cal.3d at p. 827, 221 Cal.Rptr. 529, 710 P.2d 329.) We are unable to read either of those cases to "deem" the operation of the exclusionary rule at a future criminal trial an adequate basis to compel an interrogatee to answer incriminating questions. On the contrary, they both stand for the interrogatee's right to insist on *immunity* as a precondition for any such compulsion. Although the term "immunity" never appears in *Lybarger,* it appears 26 times in *Turley,* and the court there described *Garrity* as "specifically

prohibit[ing]" the employer-state "from compel[ling] testimony *that had not been immunized.*" (*Turley, supra,* 414 U.S. at p. 82, 94 S.Ct. 316, italics added; see *id.* at p. 84, 94 S.Ct. 316, italics added ["the accommodation between the interest of the State and the Fifth Amendment requires *373 that the State have means at its disposal to secure testimony *if immunity is supplied* and testimony is *still* refused"]; *id.* at pp. 85-86, 94 S.Ct. 316, italics added ["*given adequate immunity,* the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment"]; *id.* at p. 85, 94 S.Ct. 316, italics added ["if answers are to be required in such circumstances *States must offer to the witness whatever immunity is required* to supplant the privilege and may not insist that the employee or contractor waive such immunity"].)

As we have said, the federal high court has directly repudiated the suggestion that the anticipated operation of the exclusionary rule supplies a substitute for a grant of immunity, justifying a compulsion to answer. (*Maness v. Meyers, supra,* 419 U.S. 449, 461-462, 95 S.Ct. 584, 42 L.Ed.2d 574; *Pillsbury v. Conboy, supra,* 459 U.S. 248, 261-262, 103 S.Ct. 608, 74 L.Ed.2d 430; *United States v. Doe, supra,* 465 U.S. at pp. 609-610, 616, 104 S.Ct. 1237.) Indeed, Justice White concurred separately in *Maness v. Meyers, supra,* 419 U.S. at page 475, 95 S.Ct. 584, to express a view similar to the one attributed to *Turley* and *Garrity* in *Lybarger,* i.e. that because answers made under compulsion after an assertion of the right to remain silent will be

inadmissible in any criminal prosecution, a refusal to answer may be punished as contempt. He concurred in the result only because the state had failed to clearly acknowledge this restriction on use. (*Id.* at pp. 475-476, 103 S.Ct. 864.) Even Justice White, however, acknowledged that *Turley* contemplated "formal immunity protections." (*Id.* at p. 475, 103 S.Ct. 864.) The court's refusal to embrace his departure from that requirement must also stand as a repudiation of the rule attributed to the federal cases in *Lybarger.*

We are of course constrained to follow the holdings of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) The actual holding of *Lybarger* is that the officer's interrogation violated a statute requiring that public safety officers be advised of their constitutional rights. The court construed the statute to require advisement of the exclusionary rule we have described, i.e., the right to exclude from evidence in any future prosecution the answers he was compelled to give. The statute at issue there has no bearing on the case before us, since plaintiff is not a public safety officer.

At the same time, it does not appear that any issue of the interrogational privilege–the right to stand mute absent a grant of immunity–was argued to or considered by the court in *Lybarger.* " 'It is axiomatic that cases are not authority for propositions not considered.' [Citation.]" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, 53 Cal.Rptr.2d 81, 916 P.2d 476.) The court's

statement that the officer had no right to remain silent was dictum and as such is not binding precedent. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 945, pp. 986-988, and cases cited.) Of course, as a lower court we are accustomed to placing great weight on the dicta of the Supreme Court and continually look to them for guidance. (See *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 67, 65 Cal.Rptr.2d 85, citations omitted ["[A] dictum of the Supreme Court ' "while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic." ' "].) In this instance, however, we are unable to reconcile the dictum with paramount federal authority, which plainly declares that a public employee cannot be compelled to give incriminating answers until *after* he has received a grant of immunity.

In addition to its divergence from federal law, reliance on the exclusionary rule as a substitute for interrogational immunity suffers from a severe logical difficulty, which is that it generates a classic paradox. The exclusionary rule is premised upon the supposition that the answers sought to be excluded were obtained *unlawfully*, i.e., were compelled in violation of the interrogatee's right to remain silent. (See *Garrity, supra*, 385 U.S. at p. 500, 87 S.Ct. 616 [statements made under threat of removal from office are inadmissible at criminal trial because "coerced" for Fifth Amendment purposes].) But *Lybarger* relies on the future operation of the exclusionary rule to justify, i.e., make lawful, a present compulsion to answer. If the compulsion to

answer is lawful, the predicate for the exclusionary rule disappears, and the answers may be introduced in a criminal trial. But if the answers will be admissible in a criminal trial, the employee cannot be compelled to give them.

The approach taken in the foregoing California cases thus propounds a paradox worthy of the Cretan philosopher Epimenides, to whom is attributed the statement, "All Cretans are liars." This is the Epimenidean Paradox, or more generically, the Liar's Paradox, often stated as, "I am a liar" or, less ambiguously, "I always lie," or "I never tell the truth." Such a statement produces an endlessly oscillating cycle of self-contradiction, because it cannot be declared true without making itself false, which in turn makes it true, again making it false, *ad infinitum.* Here, the federal exclusionary rule bars from evidence a statement that has been *unlawfully* compelled; but *Lybarger* relies on this prospective exclusion to make the compulsion *lawful,* a result which (if sound) would prevent operation of the exclusionary rule, which would (again) make the compulsion unlawful, *ad infinitum.*

Here the United States Supreme Court has squarely held, not once but repeatedly, that the Fifth Amendment privilege deflects any official compulsion to answer incriminating questions until *after immunity has been granted.* We decline to perpetuate the supposition, which we consider erroneous, that this rule has been superseded by the federal exclusionary rule that

remedies an unlawful abridgement of the right to remain silent.[6]

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6. In addition to *Kelly, supra,* 94 Cal.App.3d 905, 156 Cal.Rptr. 795, and *Szmaciarz, supra,* 79 Cal.App.3d 904, 145 Cal.Rptr. 396, this supposition is reflected in a number of Court of Appeal decisions. In *TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834, 1852-1854, 31 Cal.Rptr.2d 460(TRW), a defense contractor instructed an employee to attend a meeting with security officers to discuss alleged violations of company rules. The employee refused to attend the meeting without an attorney. After he was discharged for insubordination he brought a tort action against the employer. The trial court ruled in limine that in seeking to interrogate the employee, the contractor had been a government actor; that demanding his attendance without an attorney violated his constitutional rights; that the investigation had focused on the employee as a criminal suspect; and that the proposed interrogation was custodial. The Court of Appeal rejected the first, second, and fourth of these conclusions, without reaching the third. (*Id.* at pp. 1847, 1849, 1852, 31 Cal.Rptr.2d 460.) It then went on to declare in dicta that even if the contractor had been a public employer, it would have been entitled to dismiss an employee who refused to answer incriminating questions. (*Id.* at pp. 1852-1854, 31 Cal.Rptr.2d 460.) This view rested in part on the dictum in *Lybarger,* in part on selective reading of federal authorities, and in part on the apparent supposition that the rule of *Turley, supra,* applies only when an express waiver of immunity is demanded. Needless to say, we consider this an inaccurate statement of the governing law.

In *People v. Humiston* (1993) 20 Cal.App.4th 460, 473, 24 Cal.Rptr.2d 515, the court explicitly conflated interrogational immunity with the exclusionary rule, declaring, "Use immunity *is* a judicially declared rule of evidence based on the privilege

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Appendix B

E. *Judicially Propounded Self-Executing Immunity*

The paradox generated by *Lybarger* could be resolved by *creating,* under state law, a new form of immunity attaching to answers compelled from public

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(Cont'd)
against self-incrimination." (Italics added.) The court cited *People v. Coleman* (1975) 13 Cal.3d 867, 120 Cal.Rptr. 384, 533 P.2d 1024 (*Coleman*), as well as *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 806-807, 210 Cal.Rptr. 204, 693 P.2d 789 (*Ramona R.*). In Coleman, the court held that when the prosecution elects to conduct a probation revocation hearing prior to a trial for substantive offenses arising from the same events, the defendant's testimony at the revocation hearing is inadmissible at trial. The genesis of this rule was the unfairness of permitting the prosecutor to use his power over the timing of these events to effectively shut the defendant's mouth at the revocation hearing. Although the court used the term "immunity" in discussing other cases, it properly described the mechanism it adopted as "a judicial rule of evidence" (*Coleman, supra,* 13 Cal.3d at p. 889, 120 Cal.Rptr. 384, 533 P.2d 1024) and an "exclusionary rule" (*id.* at pp. 889, 891, 892, 120 Cal.Rptr. 384, 533 P.2d 1024 et seq.). In *Ramona R.,* a minor argued that the juvenile court presiding over a fitness hearing "erred in refusing to grant her immunity from use at trial of any statements she made in the fitness hearing or to her probation officer." (*Ramona R., supra,* 37 Cal.3d at p. 804, 210 Cal.Rptr. 204, 693 P.2d 789.) The court discussed earlier decisions in which it had adopted exclusionary rules, which it pervasively labeled "immunities," to shield statements by minors in juvenile court proceedings. (*Id.* at pp. 806, 210 Cal.Rptr. 204, 693 P.2d 789 et seq., citing *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 587, 102 Cal.Rptr. 831, 498 P.2d 1079 & *In re Wayne H.* (1979) 24 Cal.3d 595, 599-600, 156 Cal.Rptr. 344, 596 P.2d 1.)

employees, or some of them, by threat of discharge.[7] Under such a regime, whenever a public employer instructed an employee to answer incriminating questions or suffer discipline for refusing to do so, an immunity would automatically arise with respect to any answers the employee might give. In *People v. Gwillim* (1990) 223 Cal.App.3d 1254, 274 Cal.Rptr. 415 (*Gwillim*), this court interpreted *Lybarger* itself to create just such a scheme, at least with respect to police officers. In *Gwillim*, an officer was interrogated by internal affairs investigators concerning accusations that he had sexually assaulted a fellow officer. The interrogating officers read him a departmental " 'Grant of Immunity Admonition,' " drafted under the influence of *Lybarger*, warning that if he refused to "make a statement," he would be "subject to discipline, including dismissal"; that any answers he gave would be "held confidential consistent with Penal Code section 832.7, and will not be divulged except as required by law"; that his answers

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7. The Legislature has already authorized a "grant[ ]" of immunity to witnesses in *state* civil service matters. (Gov.Code, §§ 18676, 18677.) Although the statutes do not explicitly identify the persons empowered to make such a "grant," they probably do not contemplate an immunity arising automatically upon the mere asking of questions by a supervisor. In any event, although we have found some two dozen statutes expressly providing for immunity in various situations, none applies to disciplinary investigations involving local public employees. Nor are we aware of any local enactment purporting to grant, or authorize the granting of, such immunity. The apparent absence of any such local enactment makes it unnecessary to consider whether local legislators have the power to make such a grant, or authorize its making.

might nonetheless be used against him "in relation to departmental charges"; and that any statements he made "under the compulsion or threats of such discipline" could not be used against him "in any subsequent criminal proceedings." (*Id.* at p. 1259, 274 Cal.Rptr. 415, fn. omitted.)

This court treated the foregoing procedure as cloaking the officer's answers with what we called "*Lybarger* immunity." (*Gwillim, supra,* 223 Cal.App.3d at pp. 1263, 1270, 274 Cal.Rptr. 415; see *id.* at p. 1258, 274 Cal.Rptr. 415 [officer's answers were "a confidential statement under a grant of use immunity"].) The principal issue was whether the trial court had properly dismissed a criminal case against the accused officer on the ground that it was improperly "taint[ed]" by the "immunized statement." (*Id.* at pp. 1258, 1270-1273, 274 Cal.Rptr. 415.) The decision is relevant here chiefly for its recognition that federal authorities do not permit a public employer to punish an employee for refusing to answer incriminating questions unless he has received a grant of immunity. *Gwillim* rescued *Lybarger* from its seeming incompatibility with this rule by reading it to *create,* as a matter of state law, an immunity arising automatically whenever a police department orders one of its officers to respond to incriminating questions while admonishing him that refusal to answer may lead to discipline and that his answers cannot be used to prosecute him.

This reading of the *Lybarger* dictum has the comparative virtue of conforming to federal constitutional authority, but is unsatisfactory for a number of reasons.[8] First, the court in *Lybarger* had no apparent intention of creating a new rule of immunity. It never mentioned "immunity" and never acknowledged any requirement that immunity be conferred. Therefore

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8. We are not the only court to struggle with *Lybarger*. In *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 616, fn. 9, 4 Cal.Rptr.3d 239, the court wrote that *Lybarger* "harmonized certain provisions of the Public Safety Officers Procedural Bill of Rights Act, reconciling them by employing use and derivative use immunity." But the *Lybarger* court identified no conflict in the statutory provisions that could be resolved by such a device. Nor did it ever refer to "immunity." It simply overlooked the requirement of immunity, treating the federal exclusionary rule as a substitute for it. In *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 313, 98 Cal.Rptr.2d 302, the court cited *Lybarger* for the proposition that if a public employer sought to punish correctional officers for "invoking their Fifth Amendment rights without having been offered immunity," the officers could "assert their constitutional rights at the disciplinary proceedings the [employer] would be obliged to commence." The court appeared to recognize, as *Lybarger* did not, that such punishment was constitutionally impermissible. However it attributed to *Lybarger* something it does not say. It says that officers can be ordered to incriminate themselves over a Fifth Amendment objection, and that their only protection against compelled self-incrimination is the federal exclusionary rule-which, as we have noted, operates only in a criminal trial. Thus, while these cases support limiting *Lybarger* to cases involving public safety officers, they do not satisfactorily explain its application even when so limited.

Gwillim, while valiantly trying to save the dictum in *Lybarger*, does so by attributing an intent that the court showed no sign of entertaining.

Further, we think it highly unlikely that the California Supreme Court, after due circumspection, *would* adopt an automatic, judicially declared but extrajudicially conferred immunity of the type posited in *Gwillim*. When the Supreme Court has squarely addressed issues of Fifth Amendment immunity, it has exhibited an ever-increasing sensitivity to the legislative and prosecutorial prerogatives potentially impaired by such immunity. (See *Byers v. Justice Court* (1969) 71 Cal.2d 1039, 80 Cal.Rptr. 553, 458 P.2d 465 (*Byers*), vacated in *California v. Byers* (1971) 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9; *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 428, 115 Cal.Rptr. 812, 525 P.2d 716 (*Kaufman*); *Daly v. Superior Court* (1977) 19 Cal.3d 132, 137 Cal.Rptr. 14, 560 P.2d 1193 (*Daly*).) These cases recognize with varying degrees of explicitness that any judicial grant of immunity must be carefully crafted lest it impinge on the legislative power to define and prescribe punishments for crimes, and on the executive power to enforce the laws thus adopted.

Prior to *Byers, supra*, 71 Cal.2d 1039, 80 Cal.Rptr. 553, 458 P.2d 465, California cases viewed immunity as a creature solely of statute. (See *Ex parte Tahbel* (1920) 46 Cal.App. 755, 759, 189 P. 804; *Ex parte Cohen* (1894) 104 Cal. 524, 528, 38 P. 364; *Ex parte Clarke* (1894) 103 Cal. 352, 354, 355, 37 P. 230.) *Byers* marked a movement

away from strict insistence on explicit statutory authorization. The court has continued, however, to ground any grant of immunity in at least *implicit* legislative approval. In *Byers* the court held that the disclosure of information under a statute requiring a driver to provide certain information when involved in an auto accident would violate the driver's privilege against self-incrimination unless he were immunized against the use of his disclosures in a criminal prosecution. (*Byers, supra,* 71 Cal.2d. at p. 1050, 80 Cal.Rptr. 553, 458 P.2d 465.) Because there was "no statute explicitly providing" such protection, the court had to determine "whether such restrictions may properly be imposed by this court." (*Ibid.*) As the court saw it, the case required resolution of "the conflict between the individual's right to protection under the Fifth Amendment privilege against self-incrimination and the government's substantial interest in having citizens report or otherwise divulge information to effectuate various regulatory measures designed to promote the public welfare." (*Id.* at p. 1049, 80 Cal.Rptr. 553, 458 P.2d 465.) The judicial imposition of use restrictions, the court opined, would "neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others."[9] (*Id.* at pp. 1053-1054, 80 Cal.Rptr. 553, 458 P.2d

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9. The concluding phrase "prosecutions of drivers involved in accidents resulting in damage to the property of others" (*Byers, supra,* 71 Cal.2d at 1054, 80 Cal.Rptr. 553, 458 P.2d 465) suggests that the chilling effect of a grant of immunity can be

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465.) Moreover, the Legislature remained free to "overrid[e]" such a measure, by "enacting legislation declaring that information derived from disclosures required by [Vehicle Code] section 20002, subdivision (a), *may* be used in criminal prosecutions, in which case the privilege could be claimed in appropriate situations." (*Id.* at p. 1055, 80 Cal.Rptr. 553, 458 P.2d 465, italics in original.)

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confined to prosecutions for a particular offense. In fact, once immunity is granted it will affect the prosecution of *any* offense to which immunized disclosures relate. The same reservation may be offered to the court's statement that the immunity created there would present "no problem of conflicting state and federal interests" because "it is the state which both demands disclosure of information in 'hit-and-run' accidents and prosecutes those who commit criminal acts on the highways." (*Id.* at p. 1055, 80 Cal.Rptr. 553, 458 P.2d 465.) As one commentator critically observed, "If a motorist has driven a stolen vehicle across state lines or has committed some other federal offense, an obeyed requirement that he or she stop after an accident might produce evidence relevant in federal courts." (T. Buck, *Self-Incrimination in Civil Litigation: The Evolution of California's Judicially Created Immunities from Murphy v. Waterfront Commission* (1982) 9 Hastings Const. L.Q. 351, 365, fn. 90.) Indeed the likelihood that a given instance of conduct will offend federal as well as state law grows apace with the ongoing "federalization" of criminal law. (W. Marshall, *Federalization: A Critical Overview* (1995) 44 DePaul L.Rev. 719, 724); see E. Chemerinski & L. Kramer, *Defining the Role of the Federal Courts* (1990) 1990 B.Y.U. L.Rev. 67; W. Schwarzer & R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice* (1994) 23 Stetson L.Rev. 651; W. Coulson, Making a Federal Case Out Of it: The Federalizing of Criminal Law (<http:// gcjustice. com/ Federalizing_of_ Criminal_ Law. htm>) (as of Jan. 8, 2007.)

The decision was vacated by the United States Supreme Court, a plurality of which held that the disclosures at issue were not protected by the Fifth Amendment. (*Byers, supra,* 402 U.S. at p. 427, 91 S.Ct. 1535.) The case retains vitality, however, as precedent for the judicial imposition of immunity in this state based upon *implied* statutory authority. Thus in *Kaufman, supra,* 12 Cal.3d 421, 115 Cal.Rptr. 812, 525 P.2d 716, the court held that despite the absence of express legislative authorization, the superior court had the power to immunize disclosures by a defendant during pretrial discovery in a civil action by the public prosecutor for deceptive advertising (see Bus. & Prof.Code, §§ 17500 et seq.) and unfair competition (see former Civ.Code, § 3369; see now Bus. & Prof.Code, § 17204). The court described *Byers, supra,* as resting on a "statutory authorization for the grant of immunity" that was "implicit in the legislation which compelled disclosure, as such legislation would otherwise be rendered impotent." (*Kaufman, supra,* 12 Cal.3d at p. 428, 115 Cal.Rptr. 812, 525 P.2d 716.) The court went on to imply legislative authority in the matter before it from the statutes authorizing the maintenance of such suits by a public prosecutor, and from a provision of the discovery act authorizing the trial court to make " 'any other order which justice requires to protect [a] party or [deposition] witness from annoyance, embarrassment, or oppression.' " (*Id.* at p. 425, 115 Cal.Rptr. 812, 525 P.2d 716, quoting former Code. Civ. Proc., § 2019, subd. (b)(1); see now Code Civ. Proc., § 2025.420, subd. (b).) The court reasoned that "a grant of immunity with a proper protective order would not frustrate but would

further the legislative purpose of suppressing deceptive advertising" (*Kaufman, supra,* 12 Cal.3d at pp. 428-429, 115 Cal.Rptr. 812, 525 P.2d 716, fn. omitted), "[n]or would it unduly hamper the prosecution of persons who, in the judgment of the authorities, should be subjected to criminal proceedings" (*id.* at p. 429, 115 Cal.Rptr. 812, 525 P.2d 716), and the Legislature remained "free to redefine the limits of authorization" if it believed the court's allowance of immunity did not conform to legislative intent (*ibid,* fn. omitted).

The court undertook its most painstaking consideration of judicially declared immunity in *Daly, supra,* 19 Cal.3d 132, 137 Cal.Rptr. 14, 560 P.2d 1193, which was a civil action for damages by the survivors of a newspaper editor who had been killed by hired gunmen in the course of a labor dispute. When some of the defendants refused on self-incrimination grounds to answer deposition questions, the plaintiffs moved for a protective order granting use immunity for their testimony. (*Ibid.*) The trial court denied the motion, ordering instead that the defendants would be barred from testifying at trial if they did not waive their Fifth Amendment privilege for purposes of discovery. (*Ibid.*)

In reviewing this order, the Supreme Court acknowledged the federal rule we have emphasized, i.e., that "a witness who refuses to answer questions on the ground of the constitutional privilege against self-incrimination may nevertheless be compelled to answer *if granted immunity* against prosecutorial use . . . in a subsequent criminal proceeding against the witness."

(*Daly, supra,* 19 Cal.3d at pp. 142-143, 137 Cal.Rptr. 14, 560 P.2d 1193, italics added.) Because immunity is "the quid pro quo constitutionally required as a condition to stripping the witness of the privilege," it typically serves the interests of the person seeking answers, not the person from whom they are sought. (*Id.* at p. 147, fn. 9, 137 Cal.Rptr. 14, 560 P.2d 1193) This was illustrated by *Kaufman,* where "[t]he protective order . . . was not for the benefit of the witness, who would have preferred to stand on the privilege [citation], but was for the protection of the right of the party seeking the order (the People) to obtain discovery without being blocked by a claim of privilege. . . ." (*Daly, supra,* at p. 147, fn. 9, 137 Cal.Rptr. 14, 560 P.2d 1193.)

Against this interest in disclosure had to be weighed a concern not acknowledged in *Lybarger,* i.e., that in the absence of at least implied legislative authority, immunity should not be granted where it would "unduly hamper prosecution" of the witness whose answers would be immunized. (*Daly, supra,* at p. 147, fn. 9, 137 Cal.Rptr. 14, 560 P.2d 1193.) The court first alluded to this interest in rejecting a suggestion of mootness, observing that the case was important partly because of "the impact of any immunity order upon the official duties of those charged with prosecuting crime." (*Id.* at p. 141, 137 Cal.Rptr. 14, 560 P.2d 1193, fn. omitted.) Concern with this potential impact pervades, indeed it dominates, the court's analysis. Thus the court wrote that "the power to grant [an] immunity order" can be derived from "statutory implication rather than express provision" (*id.* at p. 143, 137 Cal.Rptr. 14, 560 P.2d 1193)

if, among other things, its exercise will " 'neither frustrate any apparent significant legislative purpose *nor unduly hamper criminal prosecutions. . . .*' " (*Id.* at p. 144, 137 Cal.Rptr. 14, 560 P.2d 1193, quoting *Byers, supra*, 71 Cal.2d at p. 1054, 80 Cal.Rptr. 553, 458 P.2d 465; italics in original.) In contrast to the hit-and-run statute at issue in *Byers*, the civil discovery statutes disclosed no "legislative preference for imposing the burdens of use immunity upon prosecuting authorities" in order to serve the interests furthered by disclosure, which here were purely private. (*Ibid.*) The private nature of these interests also distinguished the case from *Kaufman, supra*, 12 Cal.3d at pp. 428-429, 115 Cal.Rptr. 812, 525 P.2d 716, where the immunity was sought by prosecuting authorities, who would themselves conduct the questioning and thus "retain [ ] complete control over the scope of immunity through the power to determine what questions would be put. . . ." (*Daly, supra*, at p. 144, 137 Cal.Rptr. 14, 560 P.2d 1193.)

At the same time, the court was unwilling to hold that the discovery interests of private litigants should be wholly disregarded. Thus it rejected the suggestion of prosecutors that immunity should only be available when actively requested by prosecuting authorities. (*Daly, supra*, 19 Cal.3d at p. 146, 137 Cal.Rptr. 14, 560 P.2d 1193.) The court acknowledged that this was the case in criminal prosecutions by virtue of a statute directly governing the issue. (*Ibid.*; see Pen.Code, § 1324.) It did not follow, however, that prosecutorial instigation was "a universal prerequisite to a judicial grant of immunity." (*Id.* at p. 146, 137 Cal.Rptr. 14, 560

P.2d 1193, citing *People v. Coleman, supra,* 13 Cal.3d 867, 120 Cal.Rptr. 384, 533 P.2d 1024, *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 122 Cal.Rptr. 61 (*Tarantino*), and *Byers, supra,* 71 Cal.2d 1039, 1048-1057, 80 Cal.Rptr. 553, 458 P.2d 465.)[10] The interests of

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10. The court's use of "immunity" in referring to *Coleman* and *Tarantino* marks a seeming departure from its otherwise careful selection of terms. Properly speaking, both of those cases announce exclusionary rules, not immunities. As the court elsewhere recognized, immunity is a prerequisite to and *quid pro quo* for *compelling* a person to make incriminating disclosures after he has asserted the right to remain silent. (*Daly, supra,* at p. 147, fn. 9, 137 Cal.Rptr. 14, 560 P.2d 1193.) As we have noted (fn. 6, *ante*), *Coleman* adopted an "exclusionary rule" and called it that. (*Coleman, supra,* 13 Cal.3d at p. 897, 120 Cal.Rptr. 384, 533 P.2d 1024.) In *Tarantino, supra,* 48 Cal.App.3d at p. 471, 122 Cal.Rptr. 61, the court held that a defendant's statements to a psychiatrist assessing his fitness to stand trial are not admissible against him to establish guilt. Although the court pronounced this a "judicially declared immunity" which was "reasonably to be implied from the code provisions" governing such inquiries (*id.* at p. 469, 122 Cal.Rptr. 61), the regime it adopted was an evidentiary rule of exclusion, not an immunity. There is no suggestion that the defendant had asserted his right to silence when questioned, or that the state would have sought to compel him to speak had he done so. Therefore no occasion for immunity arose, and the courts' use of that term was simply inaccurate. The Supreme Court then echoed that usage when it endorsed *Tarantino's* holding in *People v. Arcega* (1982) 32 Cal.3d 504, 518, 522, 186 Cal.Rptr. 94, 651 P.2d 338 (*Arcega*). In support of the "immunity" thus adopted, the court cited *Estelle v. Smith* (1981) 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (*Estelle*). But that case held only that

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prosecutors required protection, as reflected in the "general condition stated in *Kaufman* and *Byers* that the granting of immunity not 'unduly hamper' subsequent criminal prosecutions." (*Id.* at p. 147, 137 Cal.Rptr. 14, 560 P.2d 1193.) Provided this condition is satisfied, however, and given the Legislature's promotion of discovery as a means of enhancing the truthseeking function in civil cases, "a civil litigant is entitled to the inclusion in a protective order under Code of Civil Procedure section 2019, subdivision (b)(1), of whatever use and derivative use immunity is required to eliminate unnecessary barriers to effectuation of the litigant's discovery rights." (*Id.* at p. 147, 137 Cal.Rptr. 14, 560 P.2d 1193, fn. omitted.)

The court concluded that a private litigant could obtain a protective order immunizing a witness in the course of discovery provided that no objection was lodged by prosecutors after timely and adequate notice of the request to the local district attorney, the state Attorney General, and United States Attorney. (*Daly,*

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statements to a competency examiner were inadmissible where the defendant had not been told that his answers would be used against him at trial-a pure example of an exclusionary rule. (*Id.* at p. 469, 101 S.Ct. 1866.) The terminological inaccuracy appears most starkly in *Arcega's* statement that *Estelle* "specifically discussed the provision of immunity" on particular pages. (*Arcega, supra,* at p. 523, 186 Cal.Rptr. 94, 651 P.2d 338, citing *Estelle v. Smith, supra,* 451 U.S. at pp. 466-469, 101 S.Ct. 1866.) In fact the word "immunity" does not appear anywhere in *Estelle.*

supra, 19 Cal.3d at pp. 148-149, 137 Cal.Rptr. 14, 560 P.2d 1193.) A prosecutor could veto the proposed immunity by submitting a sworn statement asserting potential interference. (*Ibid.*) Such a statement would be viewed as "conclusively establishing that an immunity order as described in the notice cannot be issued because it would or might unduly hamper criminal prosecution of the witness." (*Id.* at p. 148, 137 Cal.Rptr. 14, 560 P.2d 1193.) The only recourse for the party seeking immunity would be "to attempt to persuade the prosecutor to withdraw the objection." (*Id.* at p. 149, 137 Cal.Rptr. 14, 560 P.2d 1193.)

The *Daly* decision reflects a meticulous balancing of the needs of would-be interrogators against the prerogative of the Legislature to define crimes and their punishments, and the power and duty of the executive to prosecute the offenses thus defined. An integral part of this balancing was *judicial supervision* of the process. The immunity authorized by that decision thus entails, first, legislative authority implied from statutes applicable to the controversy in which the request for immunity arose; second, due consideration of the risk that immunity may significantly hinder enforcement of the criminal laws; and third, direct involvement of a court by whom the merits of a particular request may be considered, and conflicting interests weighed.

This approach could hardly contrast more sharply with the "*Lybarger* immunity" recognized in *Gwillim*. If applied universally, *Lybarger/Gwillim* immunity would empower any supervisor of public employees to

immunize their answers merely by threatening discipline for failure to answer. Such a regime shares none of *Daly's* careful balancing. It is entirely unmoored from any statute, and requires no judicial oversight of any kind. It takes no account of the paramount concern expressed in *Daly* "that the granting of immunity not 'unduly hamper' subsequent criminal prosecutions." (*Daly, supra,* 19 Cal.3d at p. 147, 137 Cal.Rptr. 14, 560 P.2d 1193, citing *Kaufman, supra,* 12 Cal.3d at p. 429, 115 Cal.Rptr. 812, 525 P.2d 716 & *Byers v. Justice Court, supra,* 71 Cal.2d at p. 1054, 80 Cal.Rptr. 553, 458 P.2d 465.)

The power to immunize disclosures cannot be freely dispensed without " 'risk [ing] the serious possibility of corruption, abuse, and substantial mischief and uncertainty in the prosecution of criminal cases. . . .' " (*Butler v. State* (1983) 462 A.2d 1230, 1233-1234, 55 Md.App. 409, quoting *Winkles v. State* (1978) 392 A.2d 1173, 1175-1176, 40 Md.App. 616; see S. Clymer, *Compelled Statements from Police Officers and Garrity Immunity* (2001) 76 N.Y.U. L.Rev. 1309, 1333-1334 (*Compelled Statements*) [noting dangers of taint by dissemination to other witnesses during internal police department investigations].) Indeed, the power to " 'immunize' " coworkers' statements may be used by unscrupulous investigators to shield friends and colleagues from criminal sanctions. (See *Compelled Statements, supra,* 76 N.Y.U. L.Rev. at pp. 1334-1335, fn. omitted ["If inclined to jeopardize a prosecution, an unscrupulous internal affairs investigator can compel a statement when not required to do so in order to

'immunize' the target officer. Similarly, such an investigator can expose potential prosecution witnesses to compelled statements in order to taint and possibly disqualify them from testifying."]; *ibid.*, fn. 95 [citing practices in Los Angeles Police Department investigations including "group interviews during which officers involved can 'get their stories straight' "].)

Even without corrupt motives, immunity can impede or obstruct vindication of the criminal laws. The risk is apparent from *Gwillim* itself, where the trial court dismissed the criminal prosecution after prosecutors and then the complaining witness were exposed to the defendant officer's immunized statements. (*Gwillim, supra,* 223 Cal.App.3d at p. 1260, 274 Cal.Rptr. 415.) This court held that dismissal was unwarranted "at this stage." (*Id.* at p. 1258, 274 Cal.Rptr. 415.) We did so, however, in deference to the trial court's findings of fact adverse to the defendant's most promising theory, which was that his immunized statements had been used to motivate the complaining officer to press charges and testify against him. (*Id.* at pp. 1274-1275, 274 Cal.Rptr. 415.)

Prosecutors faced with a claim of immunity "taint" have not always fared so well. (See *United States v. Hubbell* (2000) 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24; *U.S. v. North* (D.C.Cir.1990) 910 F.2d 843, 856, 871, modified on another point in *U.S. v. North* (D.C.Cir.1990) 920 F.2d 940, cert. denied; *U.S. v. Poindexter* (D.C.Cir.1991) 951 F.2d 369, 377.) As these cases and *Gwillim* illustrate, vindication of the criminal laws can

be hindered, and in extreme cases thwarted altogether, not only by the prosecutor's *own* exposure to immunized disclosures and evidence arguably derived from them, but by the exposure of *other witnesses* to tainted evidence during the course of the investigation or proceeding.[11] It requires little imagination to discern a substantial risk that supervisors clothed with the power to peremptorily immunize the disclosures of their subordinates could quickly entangle a potential criminal prosecution in such Gordian complexities that no prosecutor could carry the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." (*Kastigar, supra,* 406 U.S. at pp. 461-462, 92 S.Ct. 1653, fn. omitted.)

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11. Here, for instance, if investigators had disclosed the contents of plaintiff's immunized statements while questioning the witness Boyd, a later prosecutor might have been required to prove that Boyd's account of events at plaintiff's criminal trial was entirely unaffected by that exposure. In the Oliver North case, prosecutors attempted to forestall such difficulties by " 'cann[ing]' " their case, i.e., placing evidence under seal before any witness gave, or was exposed to, immunized testimony. (See *United States v. North, supra,* 910 F.2d at p. 871.) The resulting convictions were nonetheless reversed because the trial court had conducted insufficient inquiry into the effect of witnesses' exposure to immunized testimony. (*Id.* at p. 872; see *id.* at pp. 863-864.) The trial court was directed on remand to "proceed witness-by-witness," and if necessary, "line-by-line and item-by-item," to establish the extent to which witnesses' testimony had been influenced. (Id. at p. 872.) On remand, after a witness stated that his trial testimony had been heavily influenced, the prosecutor conceded that he was unable to meet his burden, and the case was dismissed. (C. Weisselberg, *Saving Miranda* (1998) 84 Cornell L.Rev. 109, 150, fn. 207.)

The court explicitly acknowledged such dangers in *Daly, supra,* 19 Cal.3d 132, 137 Cal.Rptr. 14, 560 P.2d 1193, in response to the plaintiffs' attempt to minimize the "impairment of prosecutorial functions" by emphasizing that any immunity granted would only bar use, not prosecution. The court wrote that "the very existence of such testimony" could present prosecutors with "serious problems of *proving* its complete independence from evidence introduced in the criminal proceeding." (*Id.* at p. 145, 137 Cal.Rptr. 14, 560 P.2d 1193, italics in original.) Nor could a court eliminate these problems, as the plaintiffs suggested, by " 'an adequately drawn protective order that seals the disclosed information from disclosure beyond the confines of the civil litigation or [by] other similar restrictions on the dissemination of the compelled testimony.' " (*Ibid.*) Even if the deposition testimony itself were not disseminated, the plaintiffs could use it to develop other evidence; moreover, they could introduce the testimony, or evidence derived from it, at trial, thereby thrusting upon any future prosecutor the burden of proving that evidence offered at the criminal trial "had origins wholly independent of evidence developed by petitioners after taking [a defendant's] deposition under an immunity order." (*Ibid.*)

Of course, even in the absence of immunity, a witness's exposure to a defendant's compelled statements can impede or prevent prosecution through the operation of the exclusionary rule. But assuming this rule places the same burden on prosecutors that immunity would impose, it still does not reflect the same

balancing of interests. It is a *remedial* device intended to restore an individual whose rights have been violated to a position approximating the one he would occupy had no violation occurred. An inescapable *effect* of the rule is to give one official (a defendant's supervisor) the *practical ability* to impede the activities of another official (the public prosecutor), in much the same way that a police officer can interfere with prosecution by conducting an unlawful search or detention. To convert the exclusionary rule into a form of immunity would transform this practical ability into a lawful *power*. In the past, such powers have been granted either by explicit legislative directive or by a judicial balancing of legislative objectives and prosecutorial interests. Before courts should grant such powers, particularly of the breathtaking scope contemplated here, the propriety of doing so should be carefully examined in light of the competing considerations and interests.

Requiring a clear grant of immunity provides superior protection to prosecutorial interests precisely because it disables other officials from unilaterally compelling statements that may taint later prosecutions. If an official wants to compel incriminating disclosures, he will have to secure immunity; if he fails to do so, the employee is entitled to stand on his right of silence without fear of repercussions. If the employee does this, no tainted disclosures will be made, and no prosecutor will be required to overcome a later claim that his case has been poisoned. To be sure, the employee's assertion of this right may pose impediments to disciplinary investigations, but surely it is not for the courts to solve

that problem with a blanket regime of automatic immunity.[12] In addition, "The process of formal grants of immunity . . . provides time for the prosecutor to protect the testimony of potential witnesses by obtaining canned statements and by shielding these witnesses from exposure to the immunized testimony." (*U.S. v. Koon* (9th Cir.1994) 34 F.3d 1416, 1433, fn. 13, rev'd on other grounds, *Koon v. United States* (1996) 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392.)

Moreover, reliance on the exclusionary rule, or on a supposed automatic immunity of ill-defined dimensions, will often fail to provide the interrogatee with adequate assurance of protection against penal consequences if he complies with demands that he answer incriminating questions. The interrogator may tell him so, as plaintiff's supervisor Guzman did here, but it is not the interrogator's opinion that matters–it is the opinion of the prosecutor, and ultimately a judge, in some future trial. The interrogatee cannot be certain that the prosecutor will not successfully assert some unguessed–

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12. This is not to say, and we do not decide, that a trial court could not, in a proper case, grant immunity for these purposes if a proper basis for jurisdiction were established. Judicial oversight, combined with the notice to prosecutors mandated in *Daly*, could go far to cure the objections we have noted. We hold only that in the absence of some semblance of legislative authority, a public employer has no power to peremptorily and unilaterally immunize statements of its employees, and that in the absence of such a grant of immunity, it cannot lawfully compel them to answer incriminating questions, or punish their refusal to do so.

at weakness in the apparent compulsion, e.g., the employer lacked authority to back up the threat of dismissal. (See *United States v. Indorato* (1st Cir.1980) 628 F.2d 711, 716 [exclusionary rule triggered only by explicit threat of discharge and state statute or ordinance mandating discharge]; *State v. Wolery, supra,* 348 N.E.2d 351, 355 [46 Ohio St.2d 316] [noting open question whether witnesses were effectively shielded where they testified under prosecutor's statutorily unauthorized promise of immunity and deliberate failure to give *Miranda* warnings]; *State v. Johnson* (1969) 462 P.2d 933, 941 [77 Wash.2d 423] [because defendant and not witness challenged prosecutor's unauthorized promise of immunity, case did not squarely present questions whether promise was valid or "whether there exist[ed] an equitable right to [its] enforcement"]; *State ex rel. Munn v. McKelvey* (Mo.1987) 733 S.W.2d 765, 768-769 [citing cases holding that in absence of statutory authorization, "promises of immunity" by sheriffs and prosecutors "are not binding and constitute no bar to a subsequent prosecution of the immunized witness"]; *id.* at p. 769, citation omitted [stating general rule in other jurisdictions "that a prosecutor is not empowered, solely by virtue of his office, to confer immunity upon a witness"]; *id.* at p. 770 [prohibition issued to prevent efforts to compel answers where neither unauthorized promise of immunity nor doctrine of "equitable immunity" was sufficient to override privilege]; cf. *U.S. v. Friedrick* (D.C.Cir.1988) 842 F.2d 382, 395 [trial court properly excluded statements made after series of ambiguous exchanges].)

The federal high court has repeatedly acknowledged these hazards. (See *Chavez v. Martinez, supra,* 538 U.S. at pp. 771-772, 123 S.Ct. 1994 ["insistence on a prior grant of immunity is essential to memorialize the fact that the testimony had indeed been compelled and therefore protected from use against the speaker in any 'criminal case' "]; *Pillsbury Co. v. Conboy, supra,* 459 U.S. 248, 261-262, 103 S.Ct. 608 [rejecting, as basis for compelled answers, the trial court's "predictive judgment" that "a court in any future criminal prosecution . . . will be obligated to protect against evidentiary use of the deposition testimony petitioners seek"].)

Because no immunity was granted or offered here, plaintiff could not be compelled to answer potentially incriminating questions, and his refusal to do so could not form the basis for discipline. The finding of insubordination therefore cannot be sustained.

III. *Unbecoming Conduct*

A. *Misleading Statements*

Plaintiff contends that there is "no evidence" that he "misled the court when he argued the legal concept of unavailability" for purposes of admitting the hearsay statements of the witness Boyd. This assertion misstates the charge, which is not that he misled the court but that he tried to do so. It also supposes, contrary to fact, that he merely "argued the legal concept of unavailability." Instead he asserted as a fact that he had

"not sent [his] investigator out to try to find" the witness "in large part" because "Mr. Boyd has a warrant out for his arrest," and if the police had failed to serve that warrant, "I think that my investigator is going to be very hard put to find *an individual who is avoiding contact with anybody that has to do with the judicial system.*" Later in the hearing plaintiff said he wanted to tell the jury that the reason Boyd had not been called to testify was "because he's got a warrant for his arrest and he's ducking." These are not abstract legal arguments but false statements of fact. As plaintiff knew perfectly well, on the day before he made these statements Boyd was not "ducking" process but was sitting in front of a television in the first place anyone would look for him: his home. Had plaintiff sent an investigator or process server there, he would likely have found Boyd, as plaintiff himself did. Further, the evidence amply supported an inference that as of the time he spoke, the reason plaintiff had made no attempt to serve Boyd was not that he thought it would be futile, as he claimed, but quite the reverse; he feared it would be successful, which would preclude the introduction of Boyd's hearsay statements, on whose ambiguity and incompleteness plaintiff hoped to rely. The evidence amply supports a finding that plaintiff willfully sought to deceive the court.

Plaintiff contends that he properly "argued a good faith belief that the witness was not going to be amenable to service of process," based on evidence that "the witness had avoided the Public Defender's investigator, David Jaquez, for most of the time the case

was pending"; that the witness had attempted to evade the police on the occasion when he and plaintiff's client were arrested; and that the reason for that attempt, as he reportedly stated to officers, was a belief that " 'he had a warrant' " outstanding against him. Plaintiff argues from these facts that "it was reasonable for [him] to believe that witness Boyd was avoiding service, despite [Boyd's] protestations to the contrary at their chance meeting." Had plaintiff disclosed the "chance meeting" he would certainly have been free to put forth the highly implausible hypothesis that Boyd was nonetheless avoiding service. What he could not do was assert as a fact that Boyd was avoiding service, or that he believed Boyd was avoiding service, when he knew that Boyd had been sitting unconcernedly in his house the day before.

Plaintiff attempts to compare the case to *Shaeffer v. State Bar* (1945) 26 Cal.2d 739, 160 P.2d 825 (*Shaeffer*), where an attorney was charged with misleading a court by failing to cite the most relevant case pertaining to a point then being argued. In holding that the incident did not warrant discipline, the Supreme Court observed that the appellant had "apparently left to opposing counsel, who was present, the burden of presenting the other side of the argument," and it did not appear that he "intentionally attempted to mislead the court." (*Id.* at p. 748, 160 P.2d 825.) But that case involved the *omission* of information of a type that the attorney's adversary might reasonably be expected to find and present. Here plaintiff could hardly "le[ave] to opposing counsel" the disclosure of *facts* known only to plaintiff.

Far nearer the mark than *Shaeffer* is *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 163, 162 Cal.Rptr. 458, 606 P.2d 765, where an attorney was disciplined for failing to inform a commissioner, to whom he had applied for a reduction in bail on behalf of this clients, that he had already twice applied unsuccessfully for such relief. The attorney contended, among other things, that he was entitled to assume that the commissioner would know or infer that a reduction had already been denied. "The short answer to this argument," the Supreme Court replied, "is one stated by Justice Brandeis: 'A judge is presumed to know the elements of law, but there is no presumption that he knows the facts.' " (*Id.* at p. 162, fn. 2, 162 Cal.Rptr. 458, 606 P.2d 765, quoting Jackson, *The Wisdom of the Supreme Court* (1962) p. 227.)

Nor was plaintiff guilty of a mere material omission. (But see *Di Sabatino, supra,* 27 Cal.3d at pp. 162-163, 162 Cal.Rptr. 458, 606 P.2d 765, citations omitted ["It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline"].) He affirmatively represented that he considered it futile to attempt to find and serve the witness, when, as the court below was entitled to find, he knew it was not. To make *Shaeffer* analogous, the attorney there would have had to not only remain silent as to the case he failed to cite, but affirmatively represent to the court that he had not looked for such a case because he believed it did not exist. If the attorney had made such a statement with knowledge that the case *did* exist, his conduct could have been described in one word: "lying."

Appendix B

Plaintiff makes the remarkable claim that his encounter with Boyd "only established the witness'[s] presence in the state" and "did not . . . materially bear on whether the witness was amenable to service." On the contrary, to say that one is "amenable to service" means only that he can be found and effectively served with process. The witness's posited reluctance to *comply* with process once served has no bearing on his amenability to service before service is attempted. Obviously, knowing where he is will tend to make him amenable to process provided he is located within the territorial jurisdiction of the court and has not secreted himself. Here there is no suggestion that the witness Boyd would have resisted an attempt to approach and hand him a subpoena. That is all "amenability to process" entails.

Plaintiff has at times made much of the apparent opinion of Judge Teilh that plaintiff did not materially mislead him. We fail to discern the relevance of this opinion. The governing question is the nature of plaintiff's conduct, not its effect on its intended hearer, or even the hearer's opinion of its gravity.

B. *Work Product Privilege*

Plaintiff contends that his conversations with and knowledge about the witness Boyd were subject to the work product privilege, and could not properly be relied upon for an inference that plaintiff acted with "deceitful intent."

" 'At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.' " (*Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 692, 284 Cal.Rptr. 655, disapproved on another point in *People v. Tillis* (1998) 18 Cal.4th 284, 295, 75 Cal.Rptr.2d 447, 956 P.2d 409; quoting *United States v. Nobles* (1975) 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141.) Where an attorney's own thoughts, impressions, research, or theories are set down in a *writing*, the writing is " 'core' work product" and its discovery is absolutely barred. (*2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1390, 7 Cal.Rptr.3d 197, quoting *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382 & fn. 19, 285 Cal.Rptr. 231, 815 P.2d 304; see citing former Code Civ. Proc., § 2018, subd. (c); see now Code Civ. Proc., § 2018.030, subd. (a).) Other materials prepared by or on behalf of an attorney in representing a client are " 'general' work product" and subject only to conditional protection. (*2,022 Ranch, supra*, at p. 1390, 7 Cal.Rptr.3d 197; see former Code Civ. Proc., § 2018, subd. (b); see now Code Civ. Proc., § 2018.030, subd. (b).)

Here plaintiff has pointed to nothing that falls within either category. He seems to suggest that Boyd's statements to him, *as reported by Boyd*, were privileged.[13] This suggestion cannot be sustained.

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13. Thus plaintiff asserts that the privilege extends to statements attributed to Boyd in a memorandum prepared by Alayne Bolster, a public defender's investigator, concerning her

(Cont'd)

Appendix B

Whatever else the work product doctrine may do, it does not stop the mouth of an independent, percipient witness with respect to what he told an attorney.

(Cont'd)

interview of Boyd on March 28, 2003. Among other things, Boyd reportedly told Bolster that when plaintiff showed up at the house, Boyd said to him that he already knew he had an outstanding warrant; that plaintiff's client Dignan had been living in the house for about a month when he was arrested; and that he, Boyd, would " 'say the same thing in court.' " According to Boyd, plaintiff replied that Boyd obviously would not help his case, that he did not want him as a witness, and either that it would have been better if he had been gone, or that it would have been better if he had moved to Oregon. Boyd reportedly quoted plaintiff as saying one or more of the following: " 'It would have been easier if I hadn't found you,' " " 'I wish you were on the run,' " " 'I thought you were on the run,' " or " 'It would have been better if you were on the run.' " At the end of the conversation, according to Boyd, plaintiff said, " 'Call me in two or three weeks and I will see what I can do to get you back on the calendar,' " an apparent offer to help clear up Boyd's outstanding warrant. Although Boyd told the investigator he did not want any part of being a witness, he said he never told plaintiff he would not go to court. He also reported telling plaintiff that "he would not want him as a witness because he would be a hostile witness." He told the investigator that he had not responded to previous contacts by the public defender's office because he did not like plaintiff's client, had had problems with him, and was not interested in helping him. He told the investigator that he was pretty upset with the whole situation involving defendant's client. " Quit f* * * * *g bugging me was how I felt. But I never said I wouldn't testify. I only said I'd tell the truth.' "

Plaintiff may mean to focus on *his statements to Boyd.* At least he asserts that these statements, as well Boyd's to him, "are the very substance of the attorney's thoughts and impressions of the witness, and privileged under the constitutionally mandated work product privilege of a criminal defense attorney." But we doubt very seriously that an attorney's statements to an independent witness can be claimed as work product. Under familiar principles of waiver, a privilege is lost when privileged matter is willingly disclosed to persons outside the scope of the privilege. If an attorney wants to protect his thoughts and impressions from disclosure, he can begin by keeping them to himself when he speaks to persons outside the defense team.

In any event, plaintiff's argument is fragmentary to the point of incoherence. He criticizes the trial court's reliance on civil cases, and claims that criminal defense attorneys possess a "constitutionally mandated work product privilege. . . ." But in the only germane precedent he cites, the Supreme Court pointedly declared that "the work product doctrine is *not* constitutionally founded. . . ." (*Izazaga v. Superior Court, supra,* 54 Cal.3d at p. 381, 285 Cal.Rptr. 231, 815 P.2d 304, italics added.) He cites Penal Code section 1054.3, which describes the scope of discovery to which the prosecution is entitled in a criminal matter; but that statute has no apparent tendency to create, define, or otherwise affect any claim of "work product" by a criminal defense attorney whose own conduct is under scrutiny in a disciplinary investigation by his employer.

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The one source plaintiff cites that actually bears on a criminal defense attorney's "work product" is Penal Code section 1054.6, which protects from disclosure "materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure. . . ." The cross-referenced statute refers exclusively to *core* work product, declaring, "A *writing* that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a), italics added.) The succeeding subdivision provides conditional protection for "[t]he work product of an attorney, other than a writing described in subdivision (a). . . ." (Code Civ. Proc., § 2018.030, subd. (b).) If the evidence cited by plaintiff is "work product" at all, it is work product "other than a writing described in subdivision (a). . . ." As such it falls *outside* the protection of the criminal work product shield set forth in Penal Code section 1054.6. (See *Izazaga v. Superior Court, supra,* 54 Cal.3d at p. 382, fn. 19, 285 Cal.Rptr. 231, 815 P.2d 304, ["[S]ection 1054.6 expressly limits the definition of 'work product' in criminal cases to 'core' work product; that is, any writing reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.' Thus, the qualified protection of certain materials under Code of Civil Procedure section 2018, subdivision (b) [now § 2018.030, subd. (b)], applicable in civil cases, is no longer available in criminal cases"].)

Plaintiff contends-without benefit of supporting authority–that criminal defense attorneys are

constitutionally entitled to "'seek to mislead or deceive'" by "fail[ing] to disclose material evidence. . . ." It is undoubtedly true that, without more, defense counsel is generally under no obligation to disclose information adverse to his client. That does not entitle counsel to seek to affirmatively mislead the court about facts bearing on such threshold determinations as the availability of a witness to testify at trial. Here counsel asserted that it would be futile to look for a witness whom he knew had been sitting at home a day earlier watching football. He also asserted that the witness was seeking to evade service of an outstanding warrant when the witness had apparently told him he was unconcerned about the warrant and would testify truthfully if summoned to do so. This was not a mere failure to reveal information damaging to plaintiff's client, but an unmistakable attempt to affirmatively mislead the court. No privilege protects such an attempt from disciplinary scrutiny.

The trial court was quite right to conclude that plaintiff's "work product" claim is "legally unsupported."

Substantial evidence supports the finding that plaintiff engaged in conduct unbecoming a county employee and tending to bring discredit upon his office.

Appendix B

IV. *Biased or Conflicted Decisionmaker*

Plaintiff contends that the trial court erroneously rejected his arguments to the effect that he was denied an impartial decisionmaker. He asserts that his rights were infringed by preexisting relationships involving three attorneys who participated in the disciplinary proceedings against him. First he complains that assistant county counsel Susan Levenberg, who presided over his *Skelly* hearing, "was also the attorney for the Santa Clara County Personnel Board." Defendant points out that after speaking to Levenberg about the matter, plaintiff's attorney expressly acceded in writing to her presiding over the hearing. Levenberg, who was retired by the time of the proceedings below, declared that during this telephone conversation she "disclosed to Spielbauer's attorney that I represented the Personnel Board in other matters," told him "that there is an ethical wall between myself and the labor attorneys" in the office, and said that she had not spoken to anyone in the office about the matter. As a result, defendant contends, plaintiff waived any objection to Levenberg's participation. Plaintiff addresses this argument only through the oblique assertion that Levenberg did not tell his attorney "that she was also the attorney for the Santa Clara County Personnel Board." The cited portions of the record are sufficient to establish that Levenberg provided some legal services to the Personnel Board, and one of them asserts that at some unspecified time she "was the primary attorney for the Personnel Board." None of them supports the critical assertion that Levenberg failed to

disclose this fact to plaintiff's attorney. If there is any evidence to that effect, plaintiff has neglected to bring it to our attention. Even if he had, it would presumably raise only an issue of fact, the trial court's resolution of which is supported by Levenberg's sworn statement. Plaintiff has therefore failed to establish any error with respect to Levenberg's role as *Skelly* officer.

Plaintiff also complains that the board lacked impartiality because "the counsel for the Personnel Board[,] Debra Cauble[,] and the prosecuting attorney for the Public Defender, Nancy Clark[,] had a relationship of attorney and client." in that "Ms. Clark was the labor an[d] employment specialist relied upon by Ms. Cauble in making decisions as a supervising County Counsel." Again plaintiff predicates a demand for reversal on a sketchy argument without even summarizing the relevant evidence, perhaps in the expectation that we will pore over the record to adorn his naked factual claims with evidentiary raiment. We are a court of review, not a clothier.

In any event, we see no colorable merit in the claim. It appears to rest on the factual premise that Cauble "utilized Nancy Clark as here [*sic*] labor and employment attorney in handling administrative matters" and that Clark "was the labor an[d] employment specialist relied upon by Ms. Cauble in making decisions as a supervising County Counsel." The only cited record support is Cauble's deposition, in which she testified that she did not recall ever consulting Clark, but that Clark was one of two labor specialists in the

office and that Cauble "probably did consult one or both of them" with respect to internal management issues. When it was suggested to plaintiff's counsel that he "break" his inquiry "down" to ascertain which labor specialist Cauble consulted, counsel declined, stating, "I think it would be better if I didn't break it down, frankly. My point being that I just want to know if you consulted with those people in general for those purposes. . . ." Counsel verges on misrepresenting the record when he cites this testimony for the proposition that Cauble in fact consulted Clark on management issues.

Furthermore, plaintiff fails to establish his legal premise, which is that a decisionmaker cannot be impartial if he has ever sought legal advice from one of the attorneys now before him. Plaintiff may have presented an argument to this effect below, but has presented none on appeal, and we again decline to search the record to flesh out his appellate presentation. The only case he cites on any specific point in this portion of his brief is *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594, 21 Cal.Rptr.3d 380, which held that an insurance company was entitled to exclude the testimony of *its own former attorney* when the latter sought to testify as an expert on claims practices. The crucial issue was whether a "substantial relationship" existed between the attorney's prior representation and the current litigation, a suit against the company. (See *id.* at pp. 602, 21 Cal.Rptr.3d 380 et seq.; Rules Prof. Conduct, rule 3-310(E).) The reviewing court held that it did. (*Id.* at p. 607, 21 Cal.Rptr.3d 380.) Plaintiff cites

the case for the propositions that "the existence of attorney/client relationship [*sic*] presumes the exchange of client confidence and the mere passage of time does not extinguish the materiality of that relationship." This is doubtless true with respect to rules of professional conduct governing conflicts of interest and an attorney's duty of loyalty to his clients, past and present. But we are concerned here with the ability of the putative former *client* to preside impartially over a case in which a former attorney represents a party. The cited case has no discernible bearing on that issue.

Plaintiff also cites Code of Civil Procedure section 170.1, subdivision (a)(2), which states in relevant part that a judge shall be disqualified if the judge served as a lawyer in the pending proceeding or a related proceeding. Plaintiff specifically refers to subdivision (a)(2)(B) of that statute, which declares that a judge shall be deemed to have served as a lawyer in the present proceeding if, within the preceding two years, he was party to certain relationships "in the private practice of law." Even if we were inclined to extend this provision beyond its terms to the practice of law in the public sector, it hardly supports plaintiff's apparent premise, which is that the passage of time has no tendency to vitiate the effect of past relationships on a judge's ability to be impartial. The statute seems to assume that two years may be enough time to dissipate whatever bias the past relationship might have engendered. Here of course there is no suggestion that Cauble was ever involved in the present matter or any related matter, nor that she has ever had the requisite type of

relationship to anybody who might have been so involved, let alone that all these conditions existed within the two years preceding her actions here.

V. *Conclusion*

The foregoing analysis leaves only the question of disposition. According to county personnel rules, "The decision to suspend, demote or dismiss depends on the seriousness of the offense." (County Code, § A25-302, subd. (b).) Here the Board found plaintiff guilty of two offenses, one of which-insubordination-we have held legally insupportable. The Board's findings explicitly based plaintiff's dismissal in part upon this offense, explaining, "As a public employee, [plaintiff] was properly informed of his rights and thereby required to respond to questions posed to him by his supervisor. . . . [Plaintiff's] refusal to acknowledge that his actions were improper and in violation of County rules indicates that [plaintiff] may engage in this type of behavior in the future. For these reasons, termination is the appropriate penalty." The record provides no basis to conclude that the Board would necessarily have sustained plaintiff's dismissal based upon the other offense alone. It is therefore necessary for the Board to make that determination.

Appendix B

Disposition

The judgment is reversed with directions to issue a writ of mandamus directing the Personnel Board to vacate its decision and reconsider the same in light of the views here expressed.

Premo, J. and Elia, J., concurred.

APPENDIX C — DECISION RE: PETITION FOR WRIT OF MANDATE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA FILED JUNE 15, 2005

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

Case No. 1-04-CV-031889

DECISION
RE: PETITION FOR WRIT
OF MANDATE

THOMAS SPIELBAUER,

Petitioner,

vs.

COUNTY OF SANTA CLARA, et al.,

Respondents.

The above-entitled case came on for hearing April 25, 2005, in Department 14 of the above entitled Court, the Honorable James P. Kleinberg, presiding. Douglas B. Allen, Esq. of Burnett, Burnett & Allen appeared as counsel for Petitioner, Thomas Spielbauer (hereafter, "Petitioner" or "Spielbauer"). Marcy L. Berkman, Esq. of the County of Santa Clara, Office of the County Counsel appeared as counsel for Respondents, County

of Santa Clara ("County"), Santa Clara County Personnel Board ("Personnel Board"), and Jose Villarreal ("Villarreal") (Collectively, County, Personnel Board, and Villarreal will be referred to as "Respondents"). Following briefing and argument by both sides, the matter was submitted for decision on April 25, 2005.

The Court, having considered the record of the administrative proceedings, the parties' briefs, all admissible evidence presented, the arguments of counsel and being fully advised, issued its Tentative Decision on May 27, 2005. On June 10, 2005 Petitioner filed his list of Controverted Issues, and on June 14, 2005 Respondents filed their Objections to Petitioner's filing. The Court has considered these further arguments in making this Decision.

FACTUAL AND PROCEDURAL BACKGROUND

Spielbauer's Alleged Misconduct.

This proceeding arose out of two independent grounds for Petitioner's termination:

- His misrepresentations to the Court on January 27, 2003
- His refusal to answer questions posed to him during the investigation of the January 27, 2003 incident

Appendix C

Spielbauer was employed for many years for the County of Santa Clara, Office of the Public Defender ("PD") in the capacity of a Deputy Public Defender. During the course of his employment, Spielbauer represented Michael Dignan ("Dignan"), a criminal defendant charged with a violation of Penal Code section 12316, subdivision (b), possession of contraband (ammunition).[1] On January 27, 2003, the Court heard pre-trial motions *in limine*. Spielbauer appeared before the Honorable Paul R. Teilh, Judge of the Superior Court, to present argument in opposition to motions *in limine* made by the deputy district attorney ("Deputy DA")[2]. In the course of that hearing, the Deputy DA sought to exclude hearsay statements made by Troy Boyd ("Boyd"), a third party witness. Spielbauer wanted to introduce Boyd's statements into evidence.

Dignan's defense relied upon a showing that he was not residing at the real property where the contraband was found (and thus did not have possession/control over any of the contraband found at that residence.) Spielbauer wanted to argue that the property where

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1. Penal Code section 12316, subdivision (b)(1) states, "No person prohibited from owning or possessing a firearm under Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition."

2. Coincidentally, the Deputy District Attorney's last name is also Boyd; to avoid confusion the prosecutor is referred to by title in this decision.

the contraband was found (123 E. Rosemary Lane, City of Campbell; hereafter, the "Property") was either owned by or rented by Boyd. The evidence to support that argument lay in a hearsay statement. In a police report, Boyd apparently made a statement that his parents owned the Property and that he (Boyd) has been renting the Property since he was 19 years of age.[3] At the January 27, 2003 hearing, the Deputy DA wanted to exclude this statement and any other hearsay statements made by Boyd.[4]

Judge Teilh suggested using alternative evidence to prove ownership and occupancy of the Property, including using public records of the Property's ownership.[5] Spielbauer apparently considered that alternative and either reviewed or obtained a copy of the grant deed.[6] However, the grant deed would not be better evidence on the issue because it only showed that Boyd's father purchased the property in 1964.[7] Tax assessments were sent to Boyd's father, presumably, with an address in Oregon, out of reach of Court service.[8]

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3. See Administrative Record ("AR"), Volume 1, Exhibit A, p. CSCEX060.

4. See AR, Vol. 1, Exhibit A, p. CSCEX068.

5. *Id.* at p. CSCEX070.

6. *Id.*

7. *Id.*

8. *Id.*

Spielbauer needed to show that Boyd was renting and living at the Property when police officers found the contraband. As yet another alternative to proving ownership and residence at the Property, the Court suggested calling other witnesses who could testify on the subject of ownership and/or residence.[9] Spielbauer represented to the Court that no other witnesses were qualified to testify on the issue.[10]

There being no other alternative evidence to establish Boyd's ownership of and residence at the Property, Spielbauer argued that Boyd's hearsay statement should be allowed under various exceptions to the hearsay rule.[11] Spielbauer argued that Boyd's statement could be admissible under a number of exceptions including, Evidence Code 1223 (Co-conspirator); Evidence Code 1230 (Declaration against Penal Interest); Evidence Code 1240/1241 (Spontaneous and Contemporaneous declaration); Evidence Code 1310 (Statement by person whose history in issue); Evidence Code 1313 (Reputation in Family); Evidence Code 1321 (Interest of Public in Property); and Evidence Code 1331 (Ancient writings).

Of these potential exceptions, the one most germane to this case is Evidence Code section 1230, declaration against penal interest. In order for that exception to

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9. *Id.* at p. CSCEX072.

10. *Id.* at pp. CSCEX072 - CSCEX073.

11. *Id.* at pp. CSCEX068 - CSCEX079.

apply, the proponent of the hearsay statement must make a showing that the hearsay declarant (Boyd) is unavailable to testify in person.[12]

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12. Evidence Code section 1230 states,

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if **the declarant is unavailable as a witness** and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Emphasis added.)

Unavailability is defined by Evidence Code section 240 to mean that the declarant is (1) exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant; (2) disqualified from testifying to the matter; (3) dead or unable to attend or testify at the hearing because of then existing physical or mental illness or infirmity; (4) absent from the hearing and the court is unable to compel his or her attendance by its process; or (5) **absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.** (Emphasis added.)

Spielbauer, at the very outset of the hearing, made the following representation to the Court:

> I cannot and I have to indicate to the Court that I have not made–I have not sent my investigator out to try to find Troy Boyd in large part because my conversations with my client, but significantly that Mr. Boyd has a warrant out for his arrest. And if the San Jose police are not going to be able to find Mr. Boyd, I think that my investigator is going to be very hard put to find an individual who is avoiding contact with anybody that has to do with the judicial system.[13]

Subsequently, at that same hearing, the following exchange took place between the Deputy DA and Spielbauer:

> Spielbauer: Right. But my concern is that the jury's going to wonder, Wait a minute, he's the person that rented the place from his parents and was living there. Who is the best person that could best exonerate Mr. Dignan? It's Troy Boyd. Why didn't Mr. Dignan call Mr. Boyd?
>
> Deputy DA: That is a very good question, Your Honor, and Mr. Spielbauer has acknowledged to this Court that he's made zero effort to locate him.

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13. See AR, Vol. 1, Exhibit A, p. CSCEX069.

> Spielbauer: Well, I'd like to tell the jury why I have not. I'd like to tell the jury why, because he's got a warrant for his arrest and he's ducking.[14]

On January 27, 2003, after hearing the arguments for and against allowing the hearsay statement, the Court decided to allow Boyd's hearsay statement(s) with respect to ownership and residence of the Property.[15] On what basis the Court allowed the statement, the record is unclear. Of the numerous exceptions argued by Spielbauer, the Court did not specify which one (or more) of those hearsay exceptions was the basis for its decision.

On January 29, 2003, during the jury selection phase of Dignan's trial, the Deputy DA prosecuting the case against Dignan learned that a police officer went out to the Property and found Boyd.[16] Boyd told the police officer that a Public Defender investigator went out to

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14. *Id.* at p. CSCEX077.

15. *Id.* at p. CSCEX076.

16. See AR, Vol. 1, Exhibit A, p. CSCEX161. [The court notes some discrepancy with the pagination of the Administrative Record. In Volume 1, Exhibit A, the pagination goes from CSCEX080 to CSCEX161. Despite the pagination errors, the administrative record appears to be complete. In the absence of any objections, the court will treat the AR as complete. Any requests to augment the record will be considered separately on a case-by-case basis.]

interview him just three days earlier on January 27, 2003.[17] Boyd also told the police officer that he informed the Public Defender investigator that he would testify differently from the hearsay statement being offered by the defense.[18] Based on those revelations, Spielbauer admitted that he was the individual, not an investigator, who went out and spoke with Boyd (on Superbowl Sunday, January 26, 2003), but first just to take pictures.[19] Thus, the Deputy DA argued that Boyd was legally available, contrary to the representations made by Spielbauer on January 27, 2003 at the motion *in limine* hearing. Judge Teilh concluded that Boyd would be treated as available in the event that his availability became an issue (as a hearsay exception) during trial.[20]

Spielbauer's Investigation/ Termination/ Administrative Appeal

On March 24, 2003, Joe Guzman ("Guzman"), Spielbauer's immediate supervisor, notified Spielbauer that an investigation into Spielbauer's alleged misrepresentations to the Court on January 27, 2003 would be conducted.[21] That investigation commenced on

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17. *Id.*

18. *Id.* at p. CSCEX162.

19. *Id.* at pp. CSCEX161 - CSCEX162.

20. *Id.* at p. CSCEX166.

21. *Id.* at p. CSCEX 169.

March 26, 2003. Guzman and Alayne Bolster ("Bolster"), Chief Public Defender ("PD") Investigator attended on behalf of the PD. Spielbauer appeared with an attorney and requested a continuance of the meeting to review legal authority and other documents.[22] That request was granted and the investigation was continued to April 1, 2003 and again to April 10, 2003.[23] On both of those occasions, Spielbauer appeared at the meetings with an attorney (or attorneys) and refused to answer any questions propounded to him by his employer.[24] Guzman repeatedly advised Spielbauer and his attorney(s) that he had a right to remain silent, but that his refusal to answer would be considered insubordination and could lead to his termination.[25] Guzman also informed Spielbauer that any statements he made during the investigation would not be used against him in any subsequent criminal proceedings.[26] In spite of Guzman's admonition, Spielbauer refused to answer any questions. Essentially, Spielbauer and his attorneys disagreed with the PD on the law regarding Spielbauer's duty to

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22. *Id.* at pp. CSCEX171 - CSCEX172 and CSCEX173.

23. *Id.* at p. CSCEX174; see also AR, Vol. 2, Exhibits F - G, pp. CSCEX302 - CSCEX366.

24. See AR, Vol. 2, Exhibits F - G, pp. CSCEX302 - CSCEX366.

25. *Id.*

26. *Id.*

respond to questioning and Spielbauer's constitutional rights.

As a result of the investigation, on June 9, 2003, Chief Assistant Public Defender David Mann ("Mann") made a recommendation that Spielbauer's employment be terminated.[27] Mann's letter recommending termination advised Spielbauer of his right to provide a response and advised Spielbauer of the right to a hearing ("*Skelly* hearing")[28] before Assistant County Counsel Susan Levenberg ("Levenberg") who acted as the hearing officer.[29] Spielbauer (through his attorneys) provided such a response on June 18, 2003 and agreed to submit the matter on the written response without a hearing.[30] Assistant county counsel Levenberg reviewed

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27. See AR, Vol. 1, Exhibit A, pp. CSCEX011 - CSCEX015.

28. See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

29. *Id.* at p. CSCEX015. Spielbauer did not object to Counsel Levenberg serving in this capacity.

30. See AR, Vol. 1, Exhibit C, pp. CSCEX236 - CSCEX296; see also AR, Vol. 1, Exhibit B, p. CSCEX232. [The Court again notes some discrepancy with the pagination of the Administrative Record. In Volume 1, Exhibit C, the pagination goes from CSCEX240 to CSCEX081. Despite the pagination errors, the administrative record appears to be complete. In the absence of any objections, the Court will treat the AR as complete. Any requests to augment the record will be considered separately on a case-by-case basis.]

the PD's recommendation and the written material submitted by Spielbauer's attorney and on June 27, 2003, Levenberg affirmed the PD's recommendation for termination.[31] Spielbauer's termination would become effective on July 3, 2003.[32]

Spielbauer had a right to appeal that decision to the Personnel Board and he did so.[33] On December 17 – 19, 2003 and January 14 – 16 and 21, 2004, the Personnel Board conducted an administrative hearing into Spielbauer's termination.[34] At the administrative hearing, deputy county counsel Deborah Cauble ("Cauble") represented the Personnel Board. Deputy county counsel Nancy Clark ("Clark") represented the County in advocating for Spielbauer's termination. Spielbauer had his own legal representation throughout the proceedings.

On February 20, 2004, the Personnel Board unanimously found that the County met its burden of proof and that the discipline imposed against Spielbauer

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31. See AR, Vol. 1, Exhibit 13, pp. CSCEX227 - CSCEX235.

32. *Id.* at p. CSCEX234.

33. *Id.*; see also AR, Vol. 2, Exhibit D, pp. CSCEX297 - CSCEX299.

34. See AR, Vol. 4., pp. 1-1603.

was appropriate.[35] As the prevailing party, the County prepared the written findings of fact which the Personnel Board adopted on or about April 2, 2004.[36] With no further administrative remedies available, Spielbauer sought judicial review. On December 7, 2004, Spielbauer filed the present petition for writ of administrative mandamus.

ANALYSIS

A threshold issue is whether Spielbauer had a fair hearing before the Personnel Board and whether the Board abused its discretion in upholding the decision to terminate Spielbauer. The Court concludes, based on the following analysis, that the hearing was fair and the Board did not abuse its discretion.

I. *Administrative Mandamus pursuant to Code of Civil Procedure section 1094.5.*

Code of Civil Procedure Section 1094.5 proscribes the Court's scope of review. In a petition for writ of administrative mandamus,

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35. See AR, Vol. 4, Exhibit 1 filed on March 25, 2005 in conjunction with Respondents' Opposition to Petition for Writ of Mandate. See Code Civ. Proc. § 1094.5(a) ["All or part of the record of the proceedings before the inferior . . . board . . . may be filed with . . . respondent's points and authorities."]

36. See AR, Vol. 4, Exhibits 1 - 2 filed on March 25, 2005 [See fn. 34, *supra.*]

> The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(Code Civ. Proc., §1094.5, subd. (b).)

In this petition, there is no argument by Spielbauer that the Respondents proceeded without or in excess of jurisdiction. The Court's inquiry thus focuses on (1) whether there was a fair trial and (2) whether there was any prejudicial abuse of discretion. Here, Spielbauer urges both procedural and substantive grounds for overturning the Personnel Board's decision affirming his termination.

On the procedural side, Spielbauer claims that he did not receive a fair and impartial hearing because the Personnel Board received advice from County Counsel who, at the same time, represented the County (PD) in prosecuting the action against him. In addition, Spielbauer contends that the Personnel Board received incorrect and prejudicial advice from its counselor, County Counsel. In his reply memorandum, Spielbauer argued for the first time that the various attorneys from County Counsel are biased in favor of one another.

On the substantive side, Spielbauer argues that substantial evidence does not support the findings made by the Personnel Board.

Procedural Due Process.

Since any decision by the Personnel Board must comport with due process, the Court addresses that issue first. In seeking this administrative writ, Spielbauer argues that he did not receive due process in the hearing before the Personnel Board. Spielbauer's argument rests on the notion that fairness could not be had where the Santa Clara County Office of County Counsel represented the County (PD) in prosecuting the action against him and, at the same time, represented the Personnel Board in its decision-making.

"Bias of the hearing officer is one of the most common grounds for challenging a decision on the basis of lack of a fair trial. When statutory law or due process requires a hearing, the adjudicator must be impartial." (See 1 California Administrative Mandamus (CEB 3rd ed. 2004) §6:45, p. 184.)

> When due process requires a hearing, the adjudicator must be impartial. Speaking of trials before judges, the United States Supreme Court has declared that "[a] fair trial in a fair tribunal is a basic requirement of due process." [Citation omitted.] Speaking of administrative hearings, and articulating the procedural requirements "demanded by

> rudimentary due process" in that setting, the Court has said that, "of course, an impartial decision maker is essential." [Citation omitted.]

(*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.)

A. *County counsel's dual roles did not result in bias. County Counsel implemented sufficient procedures to eliminate (or adequately reduce) the risk of bias.*

Petitioner accuses deputy county counsel Clark, the prosecuting attorney, of providing advice to the decision-makers (Personnel Board). More specifically, in its moving papers, Petitioner contends that the Personnel Board consulted with its legal advisor, deputy county counsel Cauble and insinuates that Cauble's advice to the Personnel Board is the same as Clark's since Cauble and Clark work in the same office. There is no evidentiary support for this accusation.

One of the questions presented is whether there can be impartiality when the role of advocate/prosecutor and decision-maker are combined. With regard to Spielbauer's termination, the PD stands on one side. On the other side is Spielbauer. The decision-making function lay with the Personnel Board. Deputy county counsel Clark represented the PD and deputy county counsel Cauble advised the Personnel Board. Both Clark and Cauble are attorneys with the County Counsel's office.

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This issue is addressed in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575. In that case a deputy sheriff was transferred and subject to suspension without pay. The deputy sheriff sought an administrative hearing before the county appeals board. Before the hearing was held, the deputy sheriff learned that the county counsel's office would be representing the sheriffs department and at the same time, county counsel would be advising the appeals board throughout the decision-making process. The deputy sheriff objected and requested county counsel disqualify itself from representing the appeals board. County counsel refused and the deputy sheriff petitioned for a writ of mandate. The trial Court denied that writ and the deputy sheriff appealed.

The appellate Court affirmed the denial without prejudice to allow the deputy sheriff to renew its petition at the trial Court level. "By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator." *(Howitt,* 3 Cal.App.4th at p. 1585). "To allow an advocate for one party to also act as counsel to the decision-maker creates the substantial risk that the advice given to the decision-maker . . . will be skewed." (*Id.*) "[M]any of the cases which raise due process concerns about these dual representation issues focus on the more obvious problem of the **same lawyer** acting as both advocate and adviser to the decision-maker." (*Id.* at p. 1586; emphasis added.) "[H]owever, the concerns do not disappear simply because **different lawyers** in the same

office perform the two functions. Performance of both roles by the same law office is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Id.*; emphasis added.) "[T]he burden of providing such assurances must rest with the law office performing the dual roles, here the county counsel's office. Generally, where an "ethical wall" defense has been allowed in attorney disqualification cases, the burden is always on the party relying on the wall to demonstrate its existence and effectiveness." The appellate Court allowed the deputy sheriff to renew its petition at the trial Court level to permit county counsel to present evidence that its office adequately screened the adviser to the appeals board from the advocate for the sheriff's department.

The ruling in *Howitt* allowing for the practice of screening is subsequently followed in *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93 where the Court paraphrased from *Howitt:*

> [T]wo lawyers from the same office could serve in dual capacities—one as prosecutor and one as legal advisor to the administrative agency—as long as they were effectively screened from each other. However, it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision maker.

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The Court in *Nightlife* easily distinguished the facts in its case because the same attorney acted in both a prosecutorial and advisory role. "[These dual functions were not held by different sections of a single office, but by *a single individual.*" (*Nightlife,* 108 Cal.App.4th at 98, italics original.)

In conjunction with its opposition, Respondents submit declarations from assistant county counsel Clark, (former) assistant county counsel Cauble, and assistant county counsel Laurie F. Faulkner ("Faulkner").[37] Each declares that the Office of the County Counsel has policies and procedures in place to ensure that proper ethical walls screen attorneys who represent conflicting client interests.[38] Clark, Cauble, and Faulkner further declare that such policies and procedures were in effect during the time that Spielbauer made his appeal to the Personnel Board and that each performed her ethical obligations in maintaining the ethical wall.[39]

Based on the evidence presented, the Court is satisfied that Respondents have met their burden of showing that an effective screen existed between deputy

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37. See Declaration of Nancy J. Clark in Opposition to Petition for Writ of Mandate filed March 25, 2005; Declaration of Debra Cauble in Opposition to Petition for Writ of Mandate filed March 25, 2005; and Declaration of Laurie F. Faulkner in Opposition to Petition for Writ of Mandate filed March 25, 2005.

38. *Id.*

39. *Id.*

county counsel Clark and assistant county counsel Cauble in their respective representation of the County (PD) and of the Personnel Board in the administrative appeal by Spielbauer.

B. *Deputy county counsel Clark provided a brief in response to an invitation from the Personnel Board for briefing and therefore, the brief does not constitute an ex-parte communication or improper advice.*

As an additional basis for arguing the lack of due process, Spielbauer takes issue with the content of two briefs submitted by Clark to the Personnel Board.[40] In those two briefs, Clark responded to a hypothetical question posed by the Personnel Board and also provided legal authority regarding a public employee's duty to respond to his employer's questions relating to his official duties. Spielbauer would have the Court believe that Clark, the prosecuting attorney, improperly submitted these briefs to the Personnel Board and that the briefs incorrectly set forth the law in advocating the County's (PD's) position.

At first blush, the argument made by Spielbauer bears some resemblance to the facts in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2005) 127 Cal.App.4th 615 *(ABC)*. However, *ABC* is distinguishable. In *ABC,* the

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40. See AR, Vol. 2, Exhibits N – 0, pp. CSCEX500 – CSCEX512.

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Department of Alcoholic Beverage Control (Department) conducts administrative proceedings against licensees for various violations. In those administrative proceedings, the prosecutor for the Department is a members of the Department's legal staff. In the three matters before the administrative law judge (ALJ) in *ABC*, the ALJ issued proposed decisions dismissing each of them. The Department does not have to accept the ALJ's proposed decision. Instead, pursuant to Government Code section 11517, subdivision (c), the Department can reject the ALJ's proposed decision and come to its own decision. In *ABC*, the Department rejected the ALJ's proposed decision and then the Department's chief counsel issued decisions suspending the licenses of the three individuals accused of violations.

> After the conclusion of the administrative hearing, but before the chief counsel rendered his decision, the Department staff attorney who appeared at the hearing prepared a document called a 'Report of Hearing' and apparently sent it to the chief counsel, among others. The Report of Hearing is a form document which the Department's prosecuting attorney fills out. On the form the attorney summarizes the evidence presented at the hearing and recommends a particular disposition for the case.

(*ABC*, 127 Cal.App.4th at p. 618.)

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The three licensees appealed their suspension to the Alcoholic Beverage Control Appeals Board (Board). The Board determined that the Department's failure to screen its decision maker from communications with the prosecuting attorney deprived the accused of their right to a fair trial by a fair tribunal, thereby violating due process. The Board also found the Report of Hearing to be an ex parte communication. The appellate Court agreed. "We hold the Department must institute screening procedures to prevent communications between the prosecutor and the decision maker (or an advisor to the decision maker) about a pending matter." (*Id.* at p. 622.)

Unlike *ABC*, the brief that Clark submitted to the Personnel Board here is not a violation of due process. The distinguishing feature of Clark's brief is that it came in response to an invitation for briefing from the Personnel Board to both the County (PD) and Spielbauer.[41] Spielbauer also submitted briefs in response to the same questions posed by the Personnel Board.[42] The briefs are not *ex parte* communications like the Report of Hearing submitted in *ABC*.

Both Clark's brief on behalf of County (PD) and Spielbauer's brief address the same hypothetical issues. The Court concludes that the Personnel Board gave each

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41. See AR, Volume 4, Day 5, pp. 1149:9 - 1151:19 and AR, Volume 4, Day 5, pp. 1073:16-1075:6

42. See AR, Vol. 3, Exhibit H, pp. 1214 - 1220.

brief its due weight. There is nothing in the record or any other evidence offered which would lead this Court to believe otherwise. Since the briefs were written in response to the Personnel Board's request, it is perfectly reasonable to expect that the briefs would be written in support of each party's position. Even if the brief(s) submitted by Clark on behalf of the County (PD) contained incorrect legal authority, that does not amount to a violation of due process. Spielbauer had an equal opportunity to provide the Personnel Board with legal authority he viewed as correct and controlling.

C. *Neither the Personnel Board nor Cauble were biased nor is there sufficient evidence to establish a suspicion of bias.*

In his reply, Spielbauer changed tack and argued for the first time that the bias did not result merely from county counsel's dual representation of the County (PD) and of the Personnel Board, but that the bias resulted from the Personnel Board's deference to the *Skelly* hearing officer's (Levenberg's) initial determination that Spielbauer should be terminated. The Court notes the PD gave Spielbauer notification on or about June 9, 2003 of its recommendation for termination.[43] In that letter, the PD informed Spielbauer of his right to respond and his right to a *Skelly* hearing.[44] Spielbauer

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43. See AR, Vol. 1, Exhibit A, pp. CSCEX011 - CSCEX015; see also fn. 26, *supra.*

44. See *AR*, Vol. 1, p. CSCEX015.

invoked his right to *a Skelly* hearing which took place by written submission on or about June 19, 2003.[45]

In Spielbauer's reply, Spielbauer submits testimony from the deposition of Cauble. Cauble testified that Levenberg's duties while employed with the County Counsel included "serv[ing] as the attorney for the Personnel Board."[46] Based on this one portion of Cauble's testimony, Spielbauer suggests that the Personnel Board would have developed a "relationship of trust, confidence, and reliance upon the legal opinions and decisions of Ms. Levenberg" such that the Personnel Board would great difficulty with making any other decision than to uphold Levenberg's initial determination that Spielbauer should be terminated.

The Court is not persuaded by this argument. First of all, the testimony is taken out of context. Cauble's actual testimony is that Levenberg "primarily handled and supervised matters relating to the Department of Social Services. She also served as the attorney for the Personnel Board. And like the rest of us, had a variety of miscellaneous assignments. But social services and in that unit was her primary responsibility, both as a lawyer and as a manager.[47] This statement gives no

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45. See *AR*, Vol. 1, Exhibit B, pp. CSCEX227 - CSCEX235.

46. See Declaration of Douglas B. Allen in Reply to Respondents Arguments, Cauble Transcript, p. 13:6 - 13:7.

47. *Id.* at p. 13:4 -13 :10.

indication as to the number of times Levenberg represented the Personnel Board nor does it offer any evidence as to the scope of the representation. In the absence of any evidence, Spielbauer's attempt to characterize Levenberg's relationship with the Personnel Board lacks foundation.

The evidence here is unlike the findings made in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 *(Quintero)*. In *Quintero*, a city police officer challenged the validity of his termination on the ground that his administrative hearing before the board violated due process. Specifically, the deputy city attorney that represented the city (police department) before the board also acted as counsel for the board on a number of past occasions, thus creating an appearance of bias and unfairness at the administrative hearing.

> [The deputy city attorney] clearly had an ongoing relationship with the Board beyond just appearing as counsel for a party. [¶] . . . [G]iven the frequent contact between [the deputy city attorney] and members of the Board, it is only natural for them to have developed a relationship. That is precisely the reason defendants must exercise vigilance and caution, to ensure not only fairness, but the appearance of fairness. It appears the lines distinguishing [the deputy city attorney's] roles of advocate and adviser have become blurred.

(Quintero, 114 Cal.App.4th at pp. 816 - 817.)

No such evidence exists here to establish a similar relationship between Levenberg and members of the Personnel Board. Moreover, Levenberg is even more removed in this situation than the deputy city attorney in *Quintero*. In *Quintero*, the deputy city attorney actually prosecuted the case before the appeals board. Here, Levenberg merely acted as the *Skelly* hearing officer. It is Clark who prosecuted the case before the Personnel Board.

This same theme is repeated by Spielbauer in arguing that Cauble had a bias in favor of her co-workers, Levenberg and Clark. Spielbauer points to Cauble's social and professional relationship with both Levenberg and Clark to suggest that Cauble's loyalties lie with her friends and co-workers. The implication is that Cauble's relationships with Levenberg and Clark will overcome any ethical wall that separates them. As before, the evidence presented by Spielbauer is insufficient to establish a suspicion of bias by Cauble with respect to the administrative appeal process. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 880, 886, fn. 6 ["[C]oncerns about the [decision-maker's] presumed "coziness" with the Department insufficient to raise a suspicion of bias."])

Accordingly, the Court does not find any violation of due process.

II. *Abuse of discretion.*

A. *Independent Judgment Test.*

An abuse of discretion can be established in one of three ways: (1) If the agency failed to proceed in the manner required by law; (2) If the decision is not supported by the findings; or (3) If the findings are not supported by the evidence. (See Code Civ. Proc. § 1094.5, subd. (b); see also 1 California Administrative Mandamus (CEB 3rd ed. 2004) §6:55, p. 191.) Here, Spielbauer's arguments focus only upon whether the decision is supported by the findings or whether the findings are supported by the evidence.

> Where it is claimed that the findings are not supported by the evidence, in cases in which the Court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the Court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the Court determines that the findings are not supported by substantial evidence in the light of the whole record.

(Code Civ. Proc. § 1094.5, subd. (c).)

There are two basic tests for determining whether the evidence supports the findings: (1) the "independent judgment" test and (2) the "substantial evidence" test.

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(See 1 California Administrative Mandamus (CEB 3rd ed. 2004) §6:129, p. 249. In the seminal decision of *Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28, 31, the California Supreme Court held that,

> If the order or decision of the agency substantially affects a fundamental vested right, the trial Court, in determining under section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence.

"Numerous Courts have upheld the existence of a vested right of permanent, nonprobationary civil service employees to continued public employment and benefits from public employment." (See 1 California Administrative Mandamus (CEB 3rd ed. 2004) §6:149, p. 270 citing *Boctor v. Los Angeles Metro. Transit Auth.* (1996) 48 Cal.App.4th 560, et al; see also *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1175.)

Independent judgment review "does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. In weighing the evidence the Courts can and should be assisted by the findings of the board. *The findings of the board come before the Court with a*

strong presumption of their correctness, and the burden rests on the complaining party to convince the Court that the board's decision is contrary to the weight of the evidence." (Fukuda v. City ofAngels (1999) 20 Cal.4th 805, 812 *(Fukuda);* italics original, internal citations and punctuation omitted.)

> A decision which is contrary to the weight of the evidence is one which is contrary to the preponderance of the evidence. The purpose for which a Court normally weighs the evidence is to determine which way it preponderates on a given issue. Evidence Code section 115 provides in pertinent part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Thus, an unexplained statement that a reviewing Court shall weigh the evidence is a statement that it shall determine whether the evidence preponderates in favor of, or against, the administrative decision under review. Such interpretation is also required by the long standing practice of Courts in this state to define "preponderance of the evidence" in terms of the weight of the evidence. For example, in *People v. Miller,* 171 Cal. 649, 652–653, our Supreme Court defined "preponderance of the evidence" as follows: "The term simply means what it says, viz., that *the evidence on one side outweighs, preponderates over,* is more than, the evidence

on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. As good a definition as we have found is that given in *Hoffman v. Loud*, 111 Mich. 156, where it is said: 'In civil cases a preponderance of evidence is all that is required, and by a "preponderance of evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.' " (Italics added.)

Thereafter, in *Noll v. Baida*, 202 Cal. 98, our Supreme Court, in rejecting a claim that fraud was required to be proved by clear and convincing evidence, said (*id.*, at p. 101): "So in civil cases tried without a jury where fraud is an issue, *it is for the trial Court to determine the weight of the evidence*, and while it cannot find fraud upon a mere suspicion, yet if there is any substantial evidence tending to prove fraud, it is for the trial Court to determine whether such evidence *outweighs or preponderates over* that adduced in opposition thereto, and when the trial Court has found that such evidence does so preponderate, its decision thereon is final, and an appellate Court has no right or authority to disturb such a finding, even though the appellate Court may be of a

> contrary opinion as to the weight of such evidence [Citations omitted.]
>
> The phrase "determine the weight of the evidence" in *Noll* is virtually identical with that contained in Code of Civil Procedure section 1094.5, "if the Court determines that the findings are not supported by the weight of the evidence," and the language in *Strumsky*, "if the findings are not supported by the weight of the evidence." **The function of the trial Court in administrative mandamus is, therefore, to examine the evidence favoring the administrative determination and "to determine whether such evidence outweighs or preponderates over that adduced in opposition thereto** . . . ." [Citation omitted.]

(*Chamberlain v. Ventura County Civil Service Commission* (1977) 69 Cal.App.3d 362, 368 – 370; emphasis added; see also 1 California Administrative Mandamus (CEB 3rd ed. 2004) §6:161, p. 279.)

"[T]he presumption [of correctness of the administrative findings] provides the trial Court with a starting point for review but it is only a presumption, and may be overcome. Because the trial Court ultimately must exercise its own independent judgment, that Court is free to substitute its own findings after first giving due respect to the agency's findings." (*Fukuda*, 20 Cal.4th at p. 818.)

B. *The Personnel Board's findings are supported by the evidence.*

1. *Spielbauer made misleading statements to the Court.*

The underlying evidence is not in dispute. The transcript of the January 27, 2003 hearing includes Spielbauer's statements to the Court and those statements speak for themselves. Where the dispute lies is in the characterization of Spielbauer's statements. The PD, the PD's investigators, the *Skelly* hearing officer, and the Personnel Board all characterized Spielbauer's statement as false and/or misleading to the Court. Spielbauer and the initial recipient of the statements, Judge Teilh, take the opposite view and do not characterize, the statements as false or misleading.[48]

On January 27, 2003 Spielbauer argued for the admissibility of a hearsay statement by Boyd. In order to have that hearsay statement admitted, Spielbauer needed to show that the statement fit within one of the various exceptions to hearsay. One such exception is Evidence Code Section 1230. As a prerequisite to invoking that particular hearsay exception, the proponent (Spielbauer) must show that the declarant (Boyd) is unavailable.

The unavailability of a declarant is a preliminary factual determination. (See Evidence Code §405; see

48. See AR, Vol. 3, Exhibit A, pp. 001121 - 001122; see also AR, Vol. 3, Exhibit J.

also *People v. Chapman* (1975) 50 Cal.App.3d 872, 879.) The proponent of the hearsay statement has the burden of proving that the declarant is unavailable. *(People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) As noted in footnote 11, *supra*, unavailability is defined in Evidence Code section 240, subdivision (a). There are five bases for unavailability, but the only basis relevant to this discussion is Evidence Code Section 240, subdivision (a)(5). That section states that a declarant is unavailable if the declarant is "absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his or her attendance by the Court's process." "Although [Evidence Code] section 240 refers to 'reasonable diligence,' this Court has often described the evaluation as one involving 'due diligence.' " *(People v. Cromer* (2001) 24 Cal.4th 889, 898.)

> What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation omitted.] The term is incapable of a mechanical definition. It has been said that the word 'diligence' connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation omitted.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the Court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed

> prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [Citation omitted], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised. [Citation omitted.]

(*People v. Sanders* (1995) 11 Cal.4th 475, 523 (*Sanders*).)

This Court's task is not to question Judge Teilh's resolution of this preliminary factual determination, but rather to consider what factual circumstances the proponent (Spielbauer) put before (or kept hidden from) Judge Teilh which would have allowed him to properly make the determination of unavailability. As noted in *Sanders*, it is the "totality of efforts of the proponent to achieve presence of the witness" that the Court must consider. (*Sanders*, 11 Cal.4th at p. 523.)

In that regard, this Court is of the opinion that Spielbauer did not disclose the totality of his efforts. Spielbauer's statements to Judge Teilh on January 27, 2003 were limited to showing Judge Teilh why any efforts on his part to secure Boyd's presence would have been futile. Certainly, futility of obtaining the declarant's live testimony is a consideration, but the relative ease with which Spielbauer found Boyd on January 26, 2003 should also have been considered. Spielbauer's failure to mention his own personal meeting with Boyd on January 26, 2003 gives rise to a strong inference that Spielbauer wanted Judge Teilh to decide the question

of unavailability without a complete representation as to the totality of his efforts.[49]

In seeking this petition, Spielbauer begins his argument by imploring this Court to give deference to Judge Teilh's subsequent statement exonerating him of misconduct. However, as this Court previously noted, Judge Teilh's ultimate determination regarding Boyd's unavailability is not controlling. Rather, this Court's function is to examine the evidence giving deference to the Personnel Board's findings. (*Fukuda, supra,* 20 Cal.4th at p. 818.) While this Court has great respect for Judge Teilh's opinion, this Court's obligation is to exercise its own independent judgment.

Next, Spielbauer makes the legally unsupported argument that information regarding a witness' availability is protected by the attorney work-product doctrine. This Court is not aware of and could not find any legal authority to support that proposition. An absolute protection exists in favor of any writing that reflects an attorney's impressions, conclusions, opinions or legal research. (Code Civ. Proc. §2018, subd. (c).) The fact that Spielbauer met with a witness is not subject to this absolute protection.

A qualified protection exists for all other work product. (Code Civ. Proc. §2018, subd. (b).) Spielbauer was not required to divulge any work product.

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49. See, Business and Professions Code § 6068 (d) and Rule 5-200, Rules of Professional Conduct.

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Spielbauer was not being asked to reveal the contents of any conversation he had with Boyd. The issue of unavailability goes to a preliminary and foundational fact and is not subject to the attorney work product protection. (Cf. *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal App.4th 996, 1004 [The identity and location of persons having knowledge of relevant facts cannot be concealed under the attorney work product rule.])

Spielbauer makes several other arguments in his moving papers (i.e., Spielbauer's personal interaction with Boyd was irrelevant to admissibility under Evidence Code section 356; the Court could have admitted the hearsay statement under Evidence Code section 1321; and Spielbauer had no obligation to reveal Boyd's conflicting statements to the jury). None of these arguments are relevant and this Court summarily disposes of them.

Ultimately, there is a line between zealous advocacy and deceit. The greater weight of the evidence here suggests that Spielbauer crossed that line. Spielbauer failed to disclose the "totality of his efforts" at securing Boyd's presence. His argument seems to be that keeping silent about what actually happened, or to tell only part of the facts, was within his prerogative as trial counsel. But, and most significantly, he affirmatively used the misleading statements and omitted to state material facts to achieve a specific result. On that basis alone, this Court finds evidence to support the Personnel Board's finding(s). Thus, the Personnel Board did not abuse its discretion.

2. *Spielbauer's refusal to answer questions posed to him by his employer during an internal investigation amounted to insubordination.*

Just as with the evidence regarding the misrepresentation to the Court, the evidence regarding Spielbauer's refusal to answer questions from his employer is essentially undisputed. On March 26, 2003, April 1, 2003, and April 10, 2003, Spielbauer appeared with his attorney(s) at investigative meetings and refused to answer any questions, claiming his Fifth Amendment privilege against self-incrimination. At the meetings of April 1, 2003 and April 10, 2003, Spielbauer was given the admonition that he had the right to remain silent and the right to assert his Fifth Amendment privilege, but that his refusal to answer any questions would be deemed insubordination and that could lead to his termination.[50] Spielbauer was further advised that any statements he made could not be used against him in any subsequent criminal proceeding. Despite being advised of his rights and the potential consequences, Spielbauer remained steadfast in his refusal to answer.

The hearings have been transcribed and thus the evidence is not in dispute. The dispute again lies in the legal interpretation of Spielbauer's rights. In this petition, Spielbauer claims that the PD's admonitions were insufficient. In order to be effective, Spielbauer

50. See AR, Vol. 2, Exhibit F, CSCEX302 - CSCEX331 and AR, Vol. 2, Exhibit G, CSCEX332 - CSCEX366.

argues that a grant of immunity was required, but the PD did not have the authority to grant that immunity. Spielbauer's argument misses the mark.

In general, immunity is offered to "induce key witnesses to testify on behalf of the state despite the self-incriminating character of their evidence." (1 Witkin and Epstein, California Criminal Law (3rd ed. 2000) Defenses, §231, p. 601.) The "general effect [of immunity statutes] is to assure the witness freedom from prosecution for any crime disclosed by the witness' testimony." (*Id.*)

Spielbauer's misunderstanding is that he believes that a grant of immunity must be given in this case. No such requirement exists. Under substantially similar facts, the Court in *Kelly v. State Personnel Board* (1979) 94 Cal.App.3d 905 *(Kelly)* held,

> It is settled that a public employee may be required to answer questions relative to his fitness for his employment if his answers cannot be used against him in a subsequent criminal proceeding. [Citation omitted.] If the employee still refuses to answer questions relevant to his official duties then he may be dismissed. [Citation omitted.]

(*Kelly v. State Personnel Board* (1979) 94 Cal.App.3d 905 (*Kelly*).)

"As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. **Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding.**" (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827; emphasis added.)

> [A] public employer *may* terminate a public employee who refuses to answer questions directly, specifically, and narrowly related to the performance of the employee's duties. [Citations omitted.] [¶] [T]he government may not, upon threat of termination, require a public employee to speak *and* to waive the immunity from use in a subsequent criminal prosecution which would ordinarily attach to such a compelled admission. [Citations omitted.]
>
> Summarized another way by our own Supreme Court, these cases show that a public employee has no constitutional right to "remain silent *free of administrative sanction.* As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incrimination rights are deemed adequately protected by

> precluding any use of his statements at a subsequent criminal proceeding." [Citation omitted.)
>
> . . . "The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right."

(*TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834.)

Spielbauer takes the unreasonable stance that a grant of immunity must be given in spite of the authority which states that his right against self-incrimination is adequately protected by precluding the use of any of his statements at a subsequent criminal proceeding. Spielbauer's interpretation of the law is mistaken. There is no evidence to suggest that Spielbauer was asked to waive his constitutional protections or that he was terminated for his refusal to do so. The evidence shows only that Spielbauer was terminated for his insubordination in refusing to cooperate in his investigation. Accordingly, the Court finds no abuse of discretion.

Appendix C

CONCLUSION

Petitioner Thomas Spieibauer's Petition for Writ of Mandate pursuant to Code of Civil Procedure Section 1094.5 is hereby DENIED.

Dated: June 14, 2005

s/ James P. Kleinberg
Hon. James P. Kleinberg
Judge of the Superior Court

APPENDIX D — SANTA CLARA COUNTY PERSONAL BOARD TERMINATION HEARING DATED APRIL 2, 2004

SANTA CLARA COUNTY PERSONNEL BOARD TERMINATION HEARING

In Re the Matter of:

THOMAS SPIELBAUER

FINDINGS OF FACT

This matter came before the Santa Clara County Personnel Board ("Board") for hearing on December 17, 18, and 19, 2003, and January 14, 15, 16, and 21, 2004. A quorum of the Board, consisting of members Jane Hermann, Primo Ramos, and Libby Spector, were at all times present as was the Personnel Board's attorney, Assistant County Counsel Debra Cauble.

Nancy Clark, Lead Deputy County Counsel, Michael L. Rossi, Deputy County Counsel, and Sabahete Hodzic, Labor Relations Representative, appeared on behalf of the County of Santa Clara ("County"). Chief Assistant Public Defender David Mann ("Mann") was present on behalf of the Santa Clara County Public Defender's Office ("Public Defender's Office") on every day except January 16, 2004, when Assistant Public Defender Grant Armstrong was present. Zacharias Ledet, Esq., appeared on behalf of Thomas Spielbauer ("Appellant"), who was present. Roy Sowards, Esq., also appeared on behalf of Appellant on January 16, 2004. The parties presented testimony and documentary evidence

regarding the termination of Thomas Spielbauer. During the hearing, Thomas Spielbauer testified on his own behalf.

Following the seven-day hearing on the dates listed above, the Board deliberated on the matter of the appeal. On February 20, 2004, the Board rendered a unanimous decision upholding the discipline imposed upon Appellant, namely termination from his position as a Deputy Public Defender with the County of Santa Clara.

Consistent with its custom and practice, the following findings of fact and conclusions have been submitted by the prevailing party, the County, and are hereby adopted by the Board:

1. On January 27, 2003, Appellant Thomas Spielbauer made false and misleading representations to a judge of the Santa Clara County Superior Court in the case of *People v. Michael Dignan*, Superior Court Case No. CC257693.

2. The false and misleading representations were made by Appellant during *in limine* motions heard by the Court on January 27, 2003. During the hearing on these motions, Appellant argued to the court that a hearsay statement made by a witness, Troy Boyd, should be admitted into evidence because Mr. Boyd was unavailable. Mr. Spielbauer submitted a warrant for Mr. Boyd's arrest as proof of Mr. Boyd's unavailability and informed the Court that he had

not asked his investigator to look for Mr. Boyd due to an outstanding warrant for Mr. Boyd's arrest and information from his client.

3. In doing so, Mr. Spielbauer deliberately attempted to mislead the Court because he did not reveal all the relevant facts regarding Mr. Boyd's availability. Appellant failed to inform the Court that efforts had in fact been made by the Office of the Public Defender to locate Mr. Boyd. Appellant also failed to inform the Court that he, the Appellant, personally met and interviewed Mr. Boyd the day before the hearing, on Sunday, January 26, 2003, at Troy Boyd's residence in Campbell, California. Appellant did not inform the Court about his discussion with Troy Boyd about the warrant or Boyd's willingness to cooperate as a witness. Instead, Appellant employed the artifice of remaining silent regarding his personal knowledge of Mr. Boyd's whereabouts in an effort to obtain an order from the Court that Mr. Boyd's hearsay statement could be admitted at trial.

4. After Appellant made these false and misleading representations regarding Mr. Boyd's unavailability on January 27, 2003, the Court ruled that Troy Boyd's hearsay statement could be admitted into evidence. After the Court was made aware of Mr. Boyd's availability on January 29, 2003, the Court changed its ruling on the admissibility on the hearsay statement by indicating that it would take Appellant's availability into consideration if the matter of the hearsay statements came up at trial.

5. Appellant's representations to the Court concerning Mr. Boyd's alleged unavailability were deliberately misleading and violated Santa Clara County Public Defender Policy and Procedure Manual, Part I, Section 505, Professional Conduct and Ethics, subsection 3, Deceit and False Statements of Law or Fact as well as Santa Clara County Merit System Rules Article 11, Section A25-301(a)(1) as a violation of written and published departmental rules and policies. Appellant's conduct also violates Merit Code Section A25-301(b)(1) as gross misconduct or conduct unbecoming a county officer or employee which tends to discredit the county or county service.

6. On March 24, 2003, Appellant received written notice that the Office of the Public Defender was conducting an investigation into alleged misrepresentations made by Appellant to the Court in the Dignan case and was asked to appear for an interview on March 26, 2003. Appellant appeared on that date with counsel and a union representative to be interviewed by Public Defender Investigator Alayne Bolster. Appellant's supervisor, Deputy Public Defender Joe Guzman, was also present. Appellant was advised of his right to remain silent but was also informed that his silence would be deemed insubordination which could lead to discipline up to and including termination. Appellant was also advised that any statement he made during the interview could not be used against him in any subsequent criminal proceeding. Through counsel, Appellant asked for

legal authority for the investigation and to review documents. The County provided Appellant with the requested citations and rescheduled the interview to April 1, 2003.

7. On April 1, 2003, Appellant appeared for the investigative interview with his lawyer, Zacharias Ledet. Joe guzman again advised Appellant of his right to remain silent but also informed Appellant that his silence would be deemed insubordination which could lead to discipline up to and including termination. Appellant was also advised that any statement he made during the interview could not be used against him in any subsequent criminal proceeding. Appellant was then asked questions that were work-related, focused on the subject of the investigation, explicit and clear. Plaintiff was instructed to answer these questions by his supervisor, Joe Guzman. Nevertheless, Appellant refused to answer virtually all the questions directly. Appellant's counsel answered a couple of questions on Appellant's behalf but the majority of the questions were not answered. Additional legal authority for Appellant's need to cooperate was provided to Appellant and another interview was scheduled.

8. The next interview was held on April 10, 2003. Appellant again appeared with counsel. Appellant was again advised that as a public employee, his refusal to answer questions would be deemed insubordination leading to discipline up to and

including termination. Appellant was also advised that any statement made during the interview could not be used against him in any subsequent criminal proceedings. Appellant again refused to answer questions.

9. Appellant was given the opportunity to correct his behavior and cooperate in the administrative investigation. But, Appellant remained steadfast in his refusal to cooperate. Appellant declined to follow his supervisors direct order even though the law upon which this order was based was provided and explained to him several times. Appellant's refusal to answer questions frustrated the legitimate need to investigate allegations of misconduct by the Public Defender's Office.

10. Appellant's persistent refusal to answer questions during the administrative investigation violated County Merit System Rule Article 11, Section A25-301(b)(1) in that he refused to accept a reasonable and proper assignment from an authorized supervisor (to answer work-related questions during an administrative interview) and was insubordinate.

11. In a letter to Appellant dated June 9, 2003, Chief Assistant Public Defender David Mann recommended Appellant be terminated from his position as a Deputy Public Defender. The recommendation was based upon violations of Sections A25-301(a)(1), A25-301(a)(5), A25-301(b)(1)

of the County's Merit System Rules as well as violation of Santa Clara County Public Defender Policy and Procedure, Professional Conduct and Ethics Section, Part 1, Section 505, subsection 3, Deceit and False Statements of Law or Fact.

12. A *Skelly* hearing was set for June 19, 2003. Appellant agreed that the hearing would be conducted by Assistant County Counsel Susan Levenberg and that Appellant's appearance would be made in writing, with papers to be submitted by his counsel. On June 27, 2003, Ms. Levenberg upheld the recommended termination and informed Appellant of his right to appeal.

CONCLUSIONS

The County has established by a preponderance of the credible evidence presented at the Personnel Board Hearing held on December 17, 18, and 19, 2003, and January 14, 15, 16, and 21, 2004, that Appellant violated each of the following Sections of the County Merit System Rules under Article 11, entitled "Disciplinary Actions," namely:

A25-301(a)(1)	Violation of the County Charter, merit system rules and regulations, written, and published departmental rules which do not conflict with this article.

A25-301(a)(5)	Refusal to accept a reasonable and proper assignment from an authorized supervisor; insubordination.
A25-301(a)(10)	Guilty of gross misconduct or conduct unbecoming a county officer or employee which tends to discredit the County or County service.

Moreover, the Board finds that Appellant violated Public Defender Policy and Procedure, Professional Conduct and Ethics Section, Part I, Section 505, subsection 3, entitled "Deceit and False Statements of Law and Fact," that states:

> "No member of the professional staff shall seek to mislead or deceive a judge, jury, or party by an artifice or false statement of fact or law or knowingly present perjured testimony or false evidence."

The Board finds that, based upon the above-established violations, termination of employment is the appropriate level of discipline for Appellant. The Board bases its decision on Appellant's (1) conduct unbecoming a County employee. By attempting to deceive the Santa Clara County Superior Court ("Court"), Appellant demonstrated a lack of personal integrity which was a discredit to himself and the office of the public defender. The Board's decision is further based upon Appellant's

insubordinate act of refusing to cooperate with the Public Defender's personnel investigation. As a public employee, Appellant was properly informed of his rights and thereby required to respond to questions posed to him by his supervisor during the investigation which were work-related, specific and clear. Appellant was given the opportunity to correct his behavior. His persistent refusal to cooperate in the investigation frustrated the department's legitimate need to investigate and was insubordinate. Appellant's refusal to acknowledge that his actions were improper and in violation of County rules indicates that Appellant may engage in this type of behavior in the future. For these reasons, termination is the appropriate penalty.

FURTHER ACTION

The Board hereby advised Appellant that he may seek judicial review of the Board decision by filing a writ of mandate pursuant to California Code of Civil Procedure Section 1094.5. The writ must be filed with a court of competent jurisdiction no later than the 90th day following the date on which the Board decision becomes final when it is mailed by first-class mail, postage prepaid, including a copy of the certificate of mailing to the party seeking such writ.

Dated: April 2, 2004

s/ Libby Spector
Libby Spector
Acting Chairperson,
Santa Clara County Personnel Board

APPENDIX E — MINUTE ORDER OF THE HONORABLE PAUL TEILH DATED JULY 29, 2003

The Court has before it a Motion to correct a record of proceedings had before it in the matter of People vs. Dignan, No. CC257693. Will all counsel please identify yourselves.

Now that the appearances are on the record, I have a declaration to make which may abate further hearing:

I am deeply troubled and disappointed that the Public Defender has taken drastic action against Deputy Public Defender THOMAS SPIELBAUER based on a faulty premise.

At the proceedings before me on January 27th and 29th, 2003, which were fully reported and transcribed, I heard both parties on the issue of non-availability of a certain witness. At these proceedings both advocates were pressing claims of misconduct against the other. I believed then and still believe that each advocate had acted according to the dictates of his own practice in good faith. Having heard both sides, I concluded that no misconduct occurred and made no finding of misconduct. Had I been mislead by either one, there would have been a citation of contempt and a referral to the State Bar.

I have never been consulted by the Public Defender as to whether or not I was mislead by Deputy Public Defender Spielbauer. This is the first occasion I have had to say on the record that I have not been mislead by him, taking into consideration all that was said and done on January 27th and 29th.

Appendix E

I recommend to the Public Defender that he reconsider his adverse action against THOMAS SPIELBAUER.

With that remark I recuse myself from further involvement in this unfortunate situation.

s/ Paul R. Teilh
Judge